MILITARY POLICE COMPLAINTS COMMISSION
COMMISSION D'EXAMEN DES PLAINTES CONCERNANT LA POLICE MILITAIRE

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FINAL REPORT

Following a Public Interest Investigation Pursuant to Section 250.38 of the *National Defence Act*

Of a Complaint Submitted by Dr. Amir Attaran

Concerning the Conduct of the Task Force Afghanistan Military Police (Roto 1) at Kandahar Air Field in Kandahar, Afghanistan

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Table of Contents

I. INTRODUCTION....3

A. Overview....3
B. Origins of the Complaint....4
C. MPCC Investigative Process....7
D. Summary of Events....11
E. Overview of Commission's Findings....14
F. Consideration of the Canadian Forces Provost Marshal's Notice of Action....16
G. Glossary of Terms / Acronyms....16

II. ANALYSIS AND DISPOSITION OF THE COMPLAINANT'S ALLEGATIONS....19

A. Introduction....19
B. Failure of MPs to Treat the Detainees Humanely (Allegation 2)....19
C. Failure to Seize and Inventory Detainee's Personal Effects (Allegation 4)....21
D. Failure to Investigate the Cause of the Detainees' Injuries (Allegation 1)....23
E. Failure of MPs to Complete Detainee-Transfer Procedures (Allegation 3)....47

III. MATTERS ARISING FROM THE CFNIS INVESTIGATION LAUNCHED IN RESPONSE TO THIS CONDUCT COMPLAINT....57

A. Introduction....57
B. Parallel Administrative and Police Investigations: The MPCC-CFNIS Protocol....57
C. Results of the CFNIS Investigation....61
D. Factors Affecting the CFNIS Investigation and the Policing Duties and Functions of MPs in Afghanistan....64

IV. SUMMARY OF FINDINGS AND THE COMMISSION'S RECOMMENDATION....71

I. INTRODUCTION

A. Overview

1. This report is in respect of a conduct complaint relating to the treatment of three Afghan detainees who passed through Canadian Forces (CF) custody in Kandahar (province), Afghanistan, between April 6-8, 2006. More specifically, this report and the underlying complaint which it addresses, focuses on the alleged acts and omissions in respect of these detainees by members of the CF military police (MP) posted to Canada's Task Force Afghanistan (TFA) and based at the International Security Assistance Force (ISAF) compound at the Kandahar Air Field (KAF) during the first rotation (Roto 1) of the TFA deployment to Kandahar (termed Operation "Archer"). It was then, and is now, the specific role of the TFA MPs at KAF to ensure the proper processing of Afghan detainees apprehended during TFA military operations prior to their transfer to the custody of the appropriate Afghan security agency (i.e., army, security service, or police) in accordance with the December 2005 bilateral arrangement between Canada and Afghanistan regarding detainees.

2. As the complaint relates to events which occurred during a military mission which is still ongoing, this necessarily places constraints, in the interests of national and operational security, on the manner and extent to which certain information may be referenced in this report. For example, this report does not refer to the three detainees involved by name, but rather only as "D1", "D2" and "D3". In some instances the Commission will have to state its conclusions, following a thorough review of all of the evidence, but without publicly revealing that evidence in detail in this report. Despite applicable security constraints, the Commission is nonetheless confident that it is able in this report to address the complainant's allegations and to communicate its analysis, findings and recommendation in a meaningful and useful way.

3. This report is divided into four parts. Part I provides the background for the remainder of the report by describing the origin and nature of the complaint which triggered the Commission's involvement, as well as an overview of the Commission's handling of the complaint and its overall conclusions resulting from its investigation. Part II consists of the

Commission's analysis of relevant information and its findings in respect of the specific allegations raised in the complaint. Part III contains a consideration of additional issues raised by the Canadian Forces National Investigation Service's (CFNIS) criminal/service offence investigation launched in response to this complaint which are associated with the allegations under consideration, along with a further finding. Part IV summarizes the Commission's findings and then sets out a recommendation in respect of this conduct complaint investigation.

B. Origins of the Complaint

4. The events forming the basis of this complaint occurred in the context of the ongoing military conflict in Afghanistan between Taliban insurgents and Afghan government forces supported by Canada and a coalition of other nations participating in the UN-mandated International Security Assistance Force (ISAF), which is under NATO command. At the time of the events in question (April 2006), the CF in Afghanistan had recently been relocated from the Afghan capital, Kabul, to the more volatile southern province of Kandahar and were transitioning from Operation Enduring Freedom (OEF) to become part of ISAF. This new assignment for the CF mission to Afghanistan meant a greater involvement by Canadian soldiers in combat operations and, consequently, in the taking of prisoners.

5. While Canada had committed itself under the transfer agreement to treat prisoners in accordance with the Third Geneva Convention[1], in keeping with ISAF policy, the Canadian government determined that Canada should not itself become a "detaining power"[2] within the meaning of the Third Geneva Convention relating to prisoners of war. For this reason, Canadian Forces serving in TFA were instructed to either release or transfer Afghan detainees to the appropriate Afghan National Security Force (ANSF) – i.e., the Afghan

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[1] Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), Aug. 12, 1949, 75 UNTS 135.

[2] "A Detaining Power, can be either a Transferring or Accepting Power, and will be a Power which detains the detainee for any period of time beyond that reasonably required between initial capture and transfer. The Detaining Power will be responsible for classification of detainee's legal status under international law." This definition is provided for in the "Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan", December 18, 2005, paragraph 8.

National Army (ANA), the Afghan National Police (ANP), or the Afghan National Directorate of Security (NDS) – as expeditiously as possible, and in any event within 96 hours of capture, absent exceptional circumstances such as medical reasons. A written arrangement between Canada and Afghanistan which provided the framework for the transfer of Afghan detainees from CF to Afghan custody had been concluded on December 18, 2005.

6. In addition to providing any necessary medical treatment, TFA personnel were required to carry out certain processing requirements in respect of all detainees who passed through Canadian custody. Such processing consisted generally of: establishing a detainee's identity and medical condition, ascertaining indicia of the detainee's involvement in anti-coalition or criminal activities, and obtaining any military intelligence which the detainee could provide. The various steps for processing the detainees in preparation for their release or transfer are set out in Theatre Standing Order (TSO) 321-A.[3]

7. Canadian Forces military police (MP) members are not generally involved in the immediate capture of detainees in operations, however, traditional CF doctrine contemplates that capturing soldiers will transfer such detainees to MP custody at the earliest opportunity. The training and skill set of MPs renders them well-suited to such custodial responsibilities. As such, MPs assigned to TFA have been utilized significantly in detainee-handling and specifically in the aforementioned processing of detainees prior to their transfer to Afghan custody. While some initial elements of detainee-processing may take place at the point of capture, the bulk of the processing occurs after the detainees have been brought to KAF for transfer to Afghan authorities.

8. In the episode under examination in this case, the three men in question were apprehended during ISAF operations in western Kandahar province. The detainees were transported [redacted] to KAF by personnel from the capturing combat arms unit. Prior to arrival at KAF, one of the detainees had sustained visible injuries to the head in the form

[3] TSO 321-A has evolved somewhat over time. The version in place at the time of the incident which is the basis of this complaint was issued by the Canadian Task Force Commander, Brigadier-General D.A. Fraser, on March 1, 2006.

of cuts and bruises to the face which had necessitated some first-aid treatment in the field. More minor injuries to the other two detainees were also noted. The MPs at KAF proceeded to process the detainees pursuant to relevant Theatre Standing Orders.

9. [redacted] the detainees arrived at KAF, and just over 24 hours after the first of the three detainees had been captured, members of the ANP arrived at KAF to pick up the detainees who were immediately handed over to them by the MPs.

10. On November 29, 2006, pursuant to an access to information request, Dr. Amir Attaran (the complainant), a professor at the University of Ottawa, received copies of CF documents pertaining to the handling of detainees in Afghanistan, including the three detainees described above. These documents were subjected to numerous redactions for reasons of national security and other grounds. Among the pieces of information redacted from the documents was identifying information about the detainees. Therefore, as the complainant readily conceded, his interpretation of the documents was based on a certain amount of speculation. Nonetheless, Dr. Attaran's analysis of these materials led him to speculate that the detainees in question may have been mistreated while in CF custody. The documents also led him to question how the injuries were sustained by these detainees, the care they were given while in CF custody, whether MP members receiving the detainees at KAF adequately enquired as to the origin of the injuries as well as the seemingly rapid transfer of the detainees to Afghan custody.

11. On January 29, 2007, Dr. Attaran sent a letter to the Military Police Complaints Commission (the Commission or MPCC)[4] requesting an investigation of the treatment of the three individuals by way of public interest investigation and hearing. In his letter, the complainant raised the following allegations in respect of the MPs responsible for the processing of the detainees at KAF and arranging their transfer to the ANP:

[4] Established in 1999, the MPCC is statutory body mandated by Parliament with providing external civilian oversight to Canadian military policing through the investigation of and reporting on complaints about MP conduct and about interference in MP investigations. While it reports to Parliament through the Minister of National Defence, the MPCC is operationally independent from both the CF and the Department of National Defence.

1) Failure to investigate the cause of injuries to the three detainees;

2) Failure to treat humanely the three injured men in their custody;

3) Failure to exercise due care in safeguarding evidence, and particularly the decision to transfer the injured men to the Afghan National Police ahead of a forensic medical examination to inquire into the nature of their injuries;

4) Failure by the MPs to seize and inventory the personal effects of at least one of the injured men, as is standard practice.

C. MPCC Investigative Process

12. As the complainant's letter alleged certain potential failings by MP members in their treatment of persons in their custody and in terms of a failure to investigate possible abuse of the detainees while in CF custody, it was deemed to constitute an MP conduct complaint pursuant to section 250.18 of the *National Defence Act* (NDA). As such, the default procedure, as established in Part IV of the NDA, called for initial investigation and disposition by the national head of the MP branch, the CF Provost Marshal (CFPM), with a right of the complainant to subsequently request a review by the Commission. However, section 250.38 of the Act provides that the Commission may launch its own investigation at any time where the Commission Chairperson believes it to be in the public interest to do so. Therefore, while the MPCC typically investigates and reports on conduct complaints only after their disposition by the CFPM, the Commission always retains the authority to intervene sooner at the Chairperson's discretion in accordance with his appreciation of the public interest in respect of a given complaint. Where the Chairperson decides that the MPCC should investigate a complaint in the public interest, the CFPM's duties in respect of the complaint are suspended.

13. As the complainant's January 29, 2007 letter of complaint included the relatively uncommon submission requesting that the MPCC Chairperson exercise his authority to launch an immediate investigation and hearing by the Commission in the public interest, I exceptionally solicited input on this point from those representing other interests at stake in the matter: the CFPM and the Chief of the Defence Staff (CDS). In their responses of

February 6th, 2007, the Commission was advised that: the CFPM had ordered the CFNIS[5] to conduct a criminal and service investigation into the conduct of all CF personnel involved; and that the CDS had decided to convene a military Board of Inquiry (BOI) into detainee-handling procedures in Afghanistan.

14. On February 9, 2007, I issued a decision to proceed with a public interest investigation into the complainant's allegations. This decision was based on the following considerations: the inherent seriousness of the allegations; the public and media attention which the allegations had received; public statements by senior officials that could create the perception of prejudgment of the allegations by military authorities; the fact that relevant military authorities had been aware of the incident some time before the complainant had issued his public complaint to the Commission but had failed to take action earlier; and the fact that the Commission's investigation would be addressing issues distinct from those of the CFNIS investigation or the BOI. At the same time, I reserved for the time being, the option of holding a hearing pending further assessment of the evidence as it developed during the course of the investigation, and based on the adequacy of cooperation on a

voluntary basis by relevant CF and Department of National Defence (DND) officials with the Commission's investigative process.

15. As the CFNIS investigation was a law enforcement matter which could lead to criminal or service charges, the integrity of that investigation was recognized to be of paramount importance. At the same time, the Commission determined that it would be contrary to the public interest for the Commission to simply hold its investigation in abeyance until such time as the CFNIS investigation was completed. Therefore, the Commission immediately set about to negotiate a protocol with the CFNIS whereby both investigations could proceed in tandem without compromising their respective interests.

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[5] The CFNIS is a specially formed unit of MP members which reports directly to the CFPM, rather than following the usual operational chain of command, and is mandated with the investigation of serious and sensitive offences in the CF as well as offences by MPs.

16. The resulting MPCC-CFNIS protocol was finalized on February 23, 2007. The protocol provided for priority of access by the CFNIS to witnesses of mutual interest to both investigations, but also for the timely sharing of information between CFNIS and MPCC investigators on an ongoing basis – such information being treated in confidence while the investigations were ongoing.

17. This arrangement enabled the MPCC to gain access to more information more quickly than would otherwise have been the case and it also enabled the MPCC to make more efficient use of its own investigative resources. At the same time, however, it did mean that the timeframe necessary for the MPCC to complete its investigation was to a significant degree dependent on the rate of progress of the CFNIS. Moreover, as will be discussed later in Part III of the report, the speed of the CFNIS investigation into this matter was hampered by a number of special challenges and obstacles.

18. From February 23, 2007, the MPCC investigation kept in close touch with the CFNIS investigation so as to advance its mandate to the extent possible without encroaching upon the work of the CFNIS. The Commission also pursued various sources for additional information and documentation. In particular, the Commission maintained close contact with the Detainee Information Support Team (DIST), a group established in March 2007 at National Defence Headquarters to coordinate the provision of CF documents to MPCC, CFNIS and the BOI.

19. The active portion of the CFNIS investigation lasted from February 2007 to July 2008. In its first phase, lasting approximately six months, the CFNIS investigation focussed on the circumstances surrounding the capture of the three detainees in the field by CF combat arms personnel. Thereafter, in its second phase, the CFNIS focus shifted mainly to the MP-processing of the detainees at KAF, which was naturally of greater significance to the MPCC and its mandate. While this methodology was a logical approach in terms of the requirements of the CFNIS investigation, it did mean that, in keeping with the joint protocol, MPCC could not begin interviewing witnesses for its own investigation until the latter half of 2007 and the MPCC was not free to interview its last witness until late July, 2008.

20. The CFNIS investigation formally concluded with the submission of its completed investigation report on September 24, 2008, a copy of which was provided to the MPCC on October 1, 2008.

21. For its part, this public interest investigation by the MPCC focused on the conduct of MP members involved with the detention, processing and transfer of the three persons identified in the complaint, most particularly their "duty to investigate" injuries sustained by the detainees. In addition, however, the Commission's investigation also ultimately examined the associated issues that motivated the apparently accelerated transfer of the detainees to Afghan authorities.

22. This investigation involved the following principal steps: meeting with the complainant; obtaining the unredacted copies of the documents on which the complainant based his complaint; the analysis of CF orders and policies applicable to the handling of detainees in Afghanistan, with particular reference to the timeframe of this incident; an examination of the relevant pre-deployment training provided to the rotation (Roto 1) of MPs involved with the processing of the detainees in question; review of CFNIS interviews of various CF personnel involved in this incident; review of CFNIS interviews of other Canadian government representatives involved in dealing with detainee matters; as well as the conduct of interviews of MPs and other military personnel involved with the treatment of the three detainees while in CF custody.

23. In all, the Commission's investigation involved the review and analysis of some 5,500 pages of documentation, including the transcripts of 54 witness interviews conducted by the CFNIS. The Commission's investigative team itself conducted 34 interviews with witnesses at various locations throughout Canada.

24. On December 31, 2008, the Commission completed its Interim Report in respect of this complaint. In conformity with NDA section 250.39, the Interim Report was provided to the Minister of National Defence, the Chief of the Defence Staff, the Judge Advocate General and the CFPM. The Act obliges the CFPM to review the Commission's Interim Report and advise the Commission, in a Notice of Action, as to any action taken, or proposed to be taken, in respect of the complaint. Before issuing this Final Report, the

Commission, as required by the Act, reviewed and considered the CFPM's Notice of Action, which was received on April 3, 2009. Further clarification which the Commission had sought regarding the interpretation of part of the Notice of Action was received from the CFPM on April 15, 2009.

D. Summary of Events

25. The three detainees involved in this case – D1, D2 and D3 – were captured in three separate incidents occurring in the course of ISAF operations in western Kandahar province on the night of April 6-7, 2006. D1 was reportedly captured in the vicinity of a cache of munitions. D2 was captured, escaped custody and was recaptured several hours later. On both occasions, he was reportedly monitoring the CF position. D3 was reportedly detained after being found in a residence which contained bomb-making materials. He reportedly failed to comply with the instructions of CF personnel and aggressively resisted apprehension. Force was used by CF personnel to subdue him.

26. The three detainees [redacted] under escort by soldiers from the capturing CF unit, arriving at [redacted][6][7] on April 7. MPs under the immediate supervision of Warrant Officer (WO) Simms [redacted] Upon arrival, WO Simms was briefed by the capturing unit's liaison officer. The MPs were advised that two of the detainees were "injured due to resisting arrest". WO Simms made a notebook entry of this information and had the liaison officer counter-sign the entry.

27. Following a quick search of the detainees for security purposes, they were immediately brought by the MPs to the KAF "Role 3" Multinational Medical Unit (MMU) for medical examination. Given his visibly more injured state, D3 was given initial medical treatment on arrival at the MMU. D1 was "deemed fit for confinement" by the physician. D1's medical examination lasted from [redacted] to [redacted]. D2's medical examination took place between [redacted] and [redacted]. At [redacted] D1 and D2 were taken to the MP compound to continue with pre-transfer processing procedures, while D3 remained at the MMU for further examination and treatment. Although heavily sedated, D3 was eventually cleared as "fit for confinement" at [redacted] and transported to the MP compound.

28. A key component of the pre-transfer processing of detainees is the tactical questioning interview for military intelligence purposes. The interviewers (non MPs) assessed that D3 was "unfit for interview" due to his sedated state, but proceeded with the two other detainees. D1 was interviewed from [redacted] to [redacted]. D2 was interviewed from [redacted] to [redacted], at which time the interview was interrupted so that the detainee could be transferred to the ANP who were then on site, having arrived at [redacted].

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[6] Many of the timings for events while the detainees were in the custody of the MPs at KAF are based on the MP notebook entries of Cpl Bertrand, who was the designated note-taker for the processing of these detainees. This practice of a single designated note-taker was adopted for security reasons in order to allow the other MPs to give their full attention to the detainees.

[7] Times given in this section of the report are in "Z" (Zulu) time, which is military code for the time at the Prime Meridian, i.e., Greenwich Mean Time. This time zone is 4.5 hours behind the time zone for Afghanistan and 5 hours ahead of the time zone for Ottawa.

29. All three detainees were transferred to the ANP at [redacted] on April 8th, 2006. This would have been [redacted]. The detainees had been in Canadian custody for approximately 24 hours, the last [redacted] hours of which were at KAF.

30. The following notations were made on the "check list" form which the MPs filled out on each detainee: no "transfer medical" was completed "due to push to transfer" and "Detainee was transferred prior to release medical due to push from higher insisting on his transfer out." In the case of D3 specifically, the notation of the MPs was that

> Detainee was not processed or interviewed due to his medical condition. Unable to process due to the wish from higher insisting on his transfer prior to being processed or undergoing a release medical.

31. At some point on April 9-10, 2006, D3 was taken by the ANP for further treatment of his head injuries to the local Afghan hospital.

32. On April 12, 2006, the Kandahar office of the ANP requested a record check on the three detainees by the Afghan National Directorate of Security (NDS). NDS advised that there were no criminal records on the three individuals.

33. In accordance with Canadian policy, the Canadian government notified the International Committee of the Red Cross (ICRC) in Geneva regarding the detainees captured by CF in Afghanistan and transferred to Afghan authorities. This notification was done via the Department of Foreign Affairs and International Trade (DFAIT).

34. In this case, the email messages forwarded to relevant officials in DND and DFAIT en route to the ICRC noted the injuries to the detainees. This prompted a reply email message on April 12, 2006, from one of the recipients, the DFAIT Deputy Director of the UN Human Rights and Humanitarian Law Section (UNHRHLS), stating: "We would like to be satisfied that no allegations of mistreatment will arise against the CF as a result of these arrests, detentions and transfers," and requesting further information on the causes and circumstances of the detainees' injuries. No response to this query was forthcoming.

35. Having received no information from TFA regarding the detainees or the circumstances of their apprehension, the ANP released the three detainees on April 14, 2006.

E. Overview of Commission's Findings

36. Through its investigation, the Commission found that the majority of the complainant's allegations were not substantiated and, indeed, were refuted by the available evidence.

37. The Commission found that the MPs treated the detainees humanely. There was no evidence of anything inappropriate towards the detainees during their time in the custody of the MPs at KAF. The MPs afforded the detainees access to timely and appropriate medical attention upon their arrival at KAF and, in particular, showed due consideration of the injured state of D3 by foregoing the bulk of his pre-transfer processing on account of his medical condition.

38. The Commission's investigation also revealed that the personal property of all three detainees was in fact seized and inventoried, albeit not on the correct form in the case of D3.

39. The Commission also determined that there was no attempt by the MPs to conceal the detainees' injuries or to cover-up their possible mistreatment by other CF members by expediting the transfer of the detainees. Indeed, as is apparent from the Commission's finding in respect of the remaining complaint allegation, the MPs lacked the state of mind to instigate a cover-up regarding the cause of D3's injuries because they readily accepted and relied upon the initial second-hand assertions from members of the capturing unit. While there was indeed a rush to transfer these detainees to Afghan custody, this was in response to general and pervasive pressure from the chain of command for maximum haste in effecting detainee-transfers.

40. The Commission's investigation did, however, lead it to conclude that the MPs at KAF should have caused some further investigation to be undertaken regarding the cause of injuries to D3, and that they failed to do so. The need for the MPs to make further inquiries (or refer the issue to the KAF CFNIS team) should arguably have been apparent from the

MPs' special law enforcement mandate within the CF, particularly given the context of the chain of command's known sensitivity regarding the treatment of detainees and its resulting need to be assured that they were properly treated and demonstrably so. However, in any event, specific technical direction clearly spelling out the need for MP investigation of detainee injuries in these circumstances had been issued by the CFPM in respect of the Afghan mission.

41. In respect of the failure to investigate D3's injuries, ultimately attributable to the Task Force Provost Marshal (TFPM), the Commission's investigation revealed a surprising lack of awareness and even acceptance by the MPs of the CFPM's technical direction in this regard.

42. Through its investigation of the other allegations, the Commission also found that the KAF MPs transferred the detainees to Afghan authorities despite the fact that certain critical pre-transfer procedures had not been completed. This failure was the product of the TFPM's decision to accede to the above-noted pressure for haste from the chain of command, rather than ensure that the necessary time was taken to complete the processing of the detainees, as it was his duty to do.

43. Before completing this investigation, the Commission had the opportunity to review CFNIS reports on its criminal/service investigation which had also been launched in response to this complaint. The CFNIS investigation resulted in very similar findings to those of the Commission in respect of the complaint allegations. However, the CFNIS investigation team also raised some important systemic concerns which not only impeded its progress, but which also hamper the ongoing effectiveness of MP operations in Afghanistan.

44. Consideration of the systemic points raised by the CFNIS investigation team, combined with the Commission's findings and analysis of the evidence in its own investigation, led the Commission to a further conclusion and related recommendation in respect of the need for further systemic reforms to the MP branch as a whole in order to ensure that the full potential contributions of MPs to upholding the Rule of Law and CF operations may be realized.

F. Consideration of the Canadian Forces Provost Marshal's Notice of Action

45. In conformity with NDA subsection 250.53(1), the Chair has prepared this Final Report after having considered the CFPM's Notice of Action. In the Notice of Action, the CFPM is required to notify the Minister and the Chair of any action that has been or will be taken with respect of the complaint, and to provide reasons for declining to act on any of the Commission's findings and recommendations.

46. On April 3, 2009, the Complaints Commission received the CFPM's Notice of Action in response to the Chair's Interim Report dated December 31, 2008. For certainty of understanding, the Commission sought clarification of a particular point regarding the Notice of Action, which clarification was received from the CFPM on April 15, 2009.

47. In his Notice of Action, the CFPM took note of the Complaints Commission's findings and expressed agreement with its recommendation in respect of this complaint and advocated appropriate action to the chain of command. However, as was to be expected, given the scope of the Commission's recommendation and its implications for the relationship between the military police and the operational chain of command, the CFPM was not in a position to respond definitively to this recommendation on his own authority. As was indicated, both in the CFPM's Notice of Action and in a separate letter from the Chief of the Defence Staff, action in respect of this recommendation is presently being contemplated by the Chief of the Defence Staff in consultation with his advisors. A final response from the Chief of the Defence Staff regarding this issue is not expected before June 2009. Following receipt of this further response to the Commission's recommendation, the Commission will issue an appropriate addendum to this report.

G. Glossary of Terms / Acronyms

ANA	Afghan National Army
ANP	Afghan National Police
ANSF	Afghan National Security Force
BGen	Brigadier-General
BOI	Board of Inquiry
Capt	Captain
CDS	Chief of the Defence Staff

CEFCOM	Canadian Expeditionary Force Command
CEFCOM PM	Canadian Expeditionary Force Command Provost Marshal
CF	Canadian Forces
CFNIS	Canadian Forces National Investigation Service
CFPM	Canadian Forces Provost Marshal
CO	Commanding Officer
Col	Colonel
Cpl	Corporal
CS	Combat Support
D PK Pol	Directorate of Peacekeeping Policy
D1	Detainee 1
D2	Detainee 2
D3	Detainee 3
DDIO	Deputy Chief of the Defence Staff (DCDS) Directives for International Operations
DFAIT	Department of Foreign Affairs and International Trade
DIST	Detainee Information Support Team
DND	Department of National Defence
GS	General Support
IAW	In accordance with
ICRC	International Committee of the Red Cross
ISAF	International Security Assistance Force
IT	Information Technology
J3 MP	Strategic Joint Staff Provost Marshal
JOC	Joint Operations Centre
KAF	Kandahar Air Field
LCol	Lieutenant-Colonel
LGen	Lieutenant-General
LO	Liaison Officer
Maj	Major
MMU	Multinational Medical Unit
MND	Minister of National Defence
MP	Military Police
MPCC	Military Police Complaints Commission
MPPTP	Military Police Policies and Technical Procedures
MWO	Master Warrant Officer
NATO	North Atlantic Treaty Organization
NCO	Non-Commissioned Officer
NDA	National Defence Act
NDHQ	National Defence Head Quarters
NDS	National Directorate of Security
OEF	Operation Enduring Freedom
Ret'd	Retired
ROE	Rules of Engagement
ROTO 1	First Rotation
SAMPIS	Security and Military Police Information System

Sgt	Sergeant
SOP	Standard Operating Procedures
TFA	Task Force Afghanistan
TFPM	Task Force Provost Marshal
TSO	Theatre Standing Order
UN	United Nations
UNHRHLS	United Nations Human Rights and Humanitarian Law Section
VCDS	Vice Chief of the Defence Staff
WO	Warrant Officer
Z	Zulu time, which is military code for the time at the Prime Meridian, i.e., Greenwich Mean Time. This time zone is 4.5 hours behind the time zone for Afghanistan and 5 hours ahead of the time zone for Ottawa.

II. ANALYSIS AND DISPOSITION OF THE COMPLAINANT'S ALLEGATIONS

A. Introduction

48. This Part of the report will address the substantive issues raised in the complaint. The Commission's formal findings, along with the supporting analysis and reasons are contained herein.

49. Each of the complainant's allegations are addressed as a separate subsection of this Part, with each such subsection containing the Commission's analysis of the evidence with respect to that issue and concluding with one or more pertinent findings and recommendations, as warranted. The Commission's actual findings and recommendations are set out in bold and numbered sequentially.

50. In his complaint, the complainant has raised four specific allegations to be addressed by the Commission. However, for the purposes of presenting a more orderly and coherent treatment of the evidence, the Commission has addressed the complainant's allegations in a distinct order from that in which they are enumerated in the complaint.

B. Failure of MPs to Treat the Detainees Humanely (Allegation 2)

51. This allegation was derived by the complainant from his analysis of documentation provided to him by the Department of National Defence under the access to information process. From the complainant's perspective, key sections of the relevant medical forms pertaining to these three detainees appeared to be blank which to him suggested that appropriate medical assessment and treatment of the detainees had either been neglected or abbreviated.

52. It must firstly be noted that the premise underlying the complainant's hypothesis in respect of this allegation was not well founded. The Commission's investigation revealed that the relevant detainee medical forms had in fact been filled out by the treating physician at the Role 3 Multinational Medical Unit at KAF. The entries on the forms simply did not photocopy well in the copies provided to the complainant pursuant to his access to

information request. For the purposes of its investigation, the Commission was able to obtain and examine better quality copies of these documents, and in an unredacted state.

53. In addition to the relevant detainee medical forms, the Commission reviewed the following evidence related to this issue: an extensive photographic record of the detainees' medical examinations; the medical examination reports filled out by the treating physician; CFNIS interview with the treating physician; copies of notes made shortly after the relevant events by CF members involved in the capture of the detainees and their transfer to KAF; copies of contemporaneous MP notes recording the processing of the detainees at KAF from their arrival through to their transfer to ANP; CFNIS and MPCC interviews with CF members involved in the capture and transfer to KAF of the detainees; and CFNIS and MPCC interviews with Roto 1 MPs at KAF involved in the processing of the detainees.

54. All of the above evidence indicates that the detainees suffered no harm while in MP custody and in fact received a high standard of medical care at KAF.

55. Upon arrival at KAF, following a search of the detainees for security purposes, the detainees were taken immediately to the Role 3 medical unit, the same facility where coalition soldiers or civilians are treated. The most injured of the detainees, D3, was examined by medical staff within 20 minutes of arrival at KAF, and all three detainees were examined within the first hour of their arrival. The evidence indicates that while some scrapes and bruises were noted in respect of D1 and D2, these were relatively minor in nature and did not require any medical treatment. Furthermore, while D1 and D2 were deemed medically fit to proceed to the MP compound for further processing in accordance with TSO 321-A, D3 remained at the medical unit for two further hours to receive more extensive treatment, which included x-rays and a CT-scan.

56. It would appear from the evidence that the medical care received by the detainees while in MP custody was not only on a par with that made available to CF members and other coalition personnel at KAF (a practical standard under the Geneva Conventions), but was seemingly of a standard, including timeliness, which many Canadians would only hope for from their local hospital.

57. Moreover, while certain steps in the detainee-transfer procedure were omitted in this case – an issue which will be examined further below in the context of allegations 4 and 3 of the complaint – the only such step of a medical nature was the "exit medical" evaluation which was to be conducted following all other pre-transfer processing, including tactical questioning. Furthermore, the requirement for an "exit medical" was imposed by the MPs themselves, apparently as a best practice; it was not mandated by either medical or command staff. Notwithstanding, given the relatively brief duration of the detainees' stay at KAF (around [redacted] in total), as well as the absence of any evidence suggesting any deterioration in the health of any of the detainees, the "exit medical" examination in this case would not appear to have served any therapeutic purposes. As such, the absence of such a further examination cannot in the circumstances be said to have harmed or jeopardized the health of the detainees.

58. The other omissions in the detainee-processing in this case related to the failure of the MPs to conduct various identification and evidentiary procedures in respect of D3 and their failure to allow for the completion of intelligence interviews with D2 and D3 will, again, be addressed more fully below in respect of allegations 4 and 3. However, it should be noted here that the decision by the MPs at the time to forego, at least for the time being, the various identification and evidentiary procedures in respect of D3 was out of consideration for his medical condition. The CF personnel responsible for interviewing the detainees made their own determination that it would not be appropriate to proceed with an interview of D3 at that time.

Finding # 1:

The Commission finds that the allegation of inhumane treatment of the detainees by military police members is not substantiated in that: no harm was caused to the detainees by any acts or omissions on the part of military police; and, the detainees were afforded prompt and appropriate medical care while in military police custody.

C. Failure to Seize and Inventory Detainee's Personal Effects (Allegation 4)

59. This element of the complaint refers to the specific failure of the responsible MPs to complete the Property Seizure Register form in respect of D3 as per TSO 321-A. The

broader issue of compliance with the mandated procedures in respect of identification and evidence-gathering will be addressed below in the context of allegation 3.

60. While it is true that the prescribed form was not completed, it was noted on the accompanying detainee "check sheet" completed on each detainee by the MP Detainee Non-Commissioned Officer, Sgt Wall, and the MP Commander, Capt Tarzwell, that this and certain other steps in the processing of D3 by the MPs at KAF were not done due to the condition of the detainee. However, this notation as it applied to this particular step is somewhat misleading, as it so happens that MP member Cpl Stokes did make a list of personal items seized from D3 on a separate piece of paper. The list was provided to Sgt Wall at the time and a copy was included in the documentation released to the complainant as part of his access to information request.

61. The list of personal items seized from D3 was apparently completed by Cpl Stokes at [redacted] on April 7, 2006, and includes the following items: broken mirror in a tin case with a comb; seven-inch long wooden stick; radio calculator; and another canister containing a mirror, tweezers, a spark plug and foldable scissors.

62. While the broader question of compliance in this case with the prescribed detainee-processing requirements, as addressed below in connection with allegation 3, raises serious concerns, the particular deficiency raised in this allegation does not. As noted above, the Commission's investigation revealed that a record of the personal items seized from the detainee in question was in fact made and submitted to the proper CF authorities at the proper time, albeit not on the intended form. At most, therefore, the omission, such as it is, was purely one of form rather than substance.

Finding #2:

The Commission finds that the allegation that the military police failed to seize and inventory the detainee's personal effects is not substantiated in that those personal effects were seized and an inventory was, in fact, included with the other detainee records, albeit not in the prescribed form.

D. Failure to Investigate the Cause of the Detainees' Injuries (Allegation 1)

1. Introduction

63. This allegation relates to the complainant's hypothesis that the MPs at KAF refrained from investigating the detainees' injuries as part of a deliberate effort to conceal possible mistreatment of the detainees by Canadian soldiers.

64. One aspect of this allegation which can be addressed at the outset is the premise that all three of the detainees in question arrived at KAF with notable injuries consistent with the deliberate application of physical force. However, a review of the facts and circumstances revealed in the evidence indicate that only D3 had injuries of this nature.

65. A key reason cited by the complainant for suspecting that there were suspicious injuries to all three of the detainees was the apparent pattern of the injuries as indicated in the Temporarily Detained Persons report entries for each detainee. The complainant notes that the injuries described in these documents are in each case confined exclusively to the upper body. However, a review of the Chronological Record of Medical Care prepared by the attending physician at the KAF "Role 3" Multinational Medical Unit, indicates that one of the detainees did have some minor injuries to the lower body.

66. The chronological medical care form for D2 noted, in addition to some "small abrasions on lower back," the presence of "15cm abrasion on L thigh, abrasion on R shin." Moreover, this detainee's injuries were sufficiently minor that the attending physician determined that he required no treatment ("no medical treatment indicated at this time"), and was immediately released for further processing by the MPs. D2's leg injuries in particular seem consistent with the evidence indicating that this detainee had managed to escape his initial apprehension by leaping down an embankment while his hands were bound [redacted]

67. Injuries to D1 appear to have been even less notable. The medical unit physician noted "no significant finding – no medical treatment needed." He was also immediately

released for further processing following his medical examination without receiving any medical treatment.

68. The relatively minor and non-suspicious character of the minor abrasions and contusions noted in respect of D1 and D2 is also borne out by examination of the photographic record of the detainees' medical examination. As for those minor abrasions and contusions which are noted, they would not seem to be inconsistent with the normal handling of detainees in the circumstances, including their apprehension, securing, and their escorted movement from place to place, [redacted]

69. Thus the evidence establishes that there is in fact no issue with respect to a failure by the MPs to investigate injuries to D1 and D2. As such, the Commission's disposition of this allegation falls to a consideration of MP conduct in respect of D3 only.

2. MP Response to D3's Injuries

70. The Temporarily Detained Person report for D3 notes the following injuries on arrival at KAF: "lacerations [cuts] on L & R eyebrows; contusions and swelling of both eyes; lacerations on L cheek; lacerations [on] centre of forehead; multiple contusions on both upper arms, back and chest." The photographic record of D3's medical examination presented startling images of the injuries to the detainee's head and face, including the cuts, bruising and swelling around the eyes. The lacerations were such that some blood had seeped through the several layers of bandages that had been applied in the field. Such injuries would clearly be indicative of the individual having received blows to the face.

71. In the circumstances, this detainee's physical appearance on his arrival at KAF would in and of itself have suggested the strong possibility of him having been subject to the deliberate application of physical force in a close-contact encounter with his CF captors. In any event, in this case, members of the capturing CF unit acknowledged that this was the cause of D3's injuries and reported this fact to the MPs at KAF when the detainees were being transferred to MP custody.

72. WO Simms, the senior non-commissioned member for the MPs responsible for the processing of detainees at KAF, along with the KAF Liaison Officer (LO) for the capturing

unit, were on hand [redacted] for the arrival of the [redacted] the detainees from the field. After briefly conferring with the soldiers who had escorted the detainees from the site of capture, the LO relayed to WO Simms that one of the detainees had a head injury, whereupon WO Simms made a note of this report in his notebook and had the LO sign it. The LO also passed on to WO Simms the capturing soldiers' verbal explanations that the injury was due to resistance during capture. The LO also promised to obtain statements from the soldiers involved and provide them to the MPs within 24 hours. Such statements were in fact taken and provided to the MPs at KAF, but the detainees had already been transferred on to the ANP.

73. Moreover, the notes of Cpl Bertrand, the primary designated MP note-taker during the processing of these detainees, records that during D3's medical examination, in response to a question by medical staff, D3 indicated, through the interpreter, that he had been "beaten by soldiers". Sgt Wall, the MP Detention Non-Commissioned Officer, indicated in his interview with Commission investigators that he would have been aware of this entry by Cpl Bertrand, as he would have reviewed those notes.

74. Also, Maj Cruikshank, the TFA National Command Element Duty Officer (responsible for briefing CEFCOM from the Joint Operations Centre (JOC)) recalls the TFPM, Maj (ret'd) Fraser, coming over to the JOC on the evening in question and saying that one of the detainees was "beat up pretty bad. He looked like he had been kind of booted." For his part, Maj (ret'd) Fraser told the CFNIS he did not recall seeing these detainees or any conversations regarding injuries to them.

75. Thus the MPs at KAF involved in the transfer process for these detainees were aware that one of the detainees had been struck a number of times about the face and head with sufficient force to cause visible lacerations, bruising and swelling. These MPs were also aware that representatives of the capturing unit had advised that such injuries had been inflicted by one or more CF members during capture in response to the detainee's resistance. In other words, the initial suggestion from the field was that the injuries to the detainee were consistent with the applicable military rules of engagement. Faced with this situation, the evidence indicates that, not only did none of the MPs involved at KAF attempt to initiate an

investigation to verify the circumstances of the detainee's injuries, but that such a step was apparently never discussed or contemplated by the MPs.

76. There is no question that resistance from a detainee in the context of military operations may warrant the use of physical force under the applicable military rules of engagement so as to provide justification for such force. This was the assessment of the capturing unit at the time. This was also the finding of the CFNIS in their criminal/service offence investigation of this matter which was launched as a result of this complaint. Moreover, while it was not for the Commission to determine the circumstances of the detainee's injuries in this case, the Commission's investigation revealed nothing to contradict the conclusion that the injuries caused to D3 by the capturing soldiers was justified.

77. The question which remains, however, is whether the MPs involved in the transfer of these detainees at KAF were justified in simply accepting the initial verbal and second-hand explanation provided by the capturing unit's Liaison Officer (who was at KAF and thus had no direct knowledge of the circumstances of capture), and not initiating any further inquiries into the matter. The Commission's conclusion, on the basis of the evidence and in light of relevant policies, orders and law, as considered below, is that this was not adequate and that the MPs involved in the processing of these detainees at KAF, but especially the TFPM, Maj (ret'd) Fraser, had a duty to conduct or cause a further investigation of the injuries to D3; and that there was a failure in the performance of this duty.

3. Source of MP Duty to Investigate D3's Injuries

78. The clearest and most immediate source of the duty of the relevant MPs to investigate the injuries to D3 was the Military Police Technical Directive for the MPs deployed to Kandahar with the TFA. This directive, entitled "Military Police Technical Directive (Op Archer)", was issued on the authority of the CFPM from National Defence Headquarters in Ottawa. The relevant version in force at the time of the events relevant to this complaint was issued on March 15, 2006 and was signed by LCol R. Lander (then Deputy Provost Marshal – Police), as Acting CFPM.

79. The nature of the CFPM's role and authority in providing technical direction to MPs is examined more fully below. However, for now it is sufficient to note that the CFPM, as the senior member of a specialized occupation within the military, has been authorized to provide technical guidance and direction on the performance of MP-specific tasks, such as investigations and law enforcement generally. The CFPM issues standing direction on certain matters in the form of the *Military Police Policies and Technical Procedures* and in mission-specific MP Technical Directives.

80. This MP Technical Directive contained the following provisions relevant to this issue:

> Section 3 - Investigations
>
> [...]
>
> 10. Full Spectrum Operations. In addition to the specific incidents mentioned at para 11, the TFPM, in consultation with the CFNIS Det Comd, shall ensure that an initial assessment is made by MP of all ROE and use of force applications by members of TFA, and is the final authority on the decision to either commence of deem unnecessary a full MP investigation based on initial findings. In either circumstance, the TFPM shall ensure that a SAMPIS entry is made to summarize the key factors lending [sic] to an invest/no invest decision. In the unlikely event that the TFPM and NIS Det Comd are unable to agree on a decision WRT the need for further investigation, the NIS Det Comd, in consultation with the CFNIS chain of command will act IAW the NIS investigative mandate (chap 6 of Ref B [MP Policies and Technical Procedures]).
>
> 11. Specific Guidance. While deployed on Multi-National operations, the appropriate component of Canadian MP (MP or CFNIS) shall investigate allegations or instances of following occurrences (attributed to Canadian Forces personnel) in addition to the normal investigations required IAW Ref B [MP Policies & Technical Procedures]:
>
> > 11A. Use of force by CF personnel resulting in injury or death.
> > [...]
> > 11D. Allegations of mistreatment of detainees in CF custody.
> > [...]
>
> Section 4 - Military Police Support to Mission
>
> 14. Detainees: [...] The TFPM is responsible for:

> [...]
> 14F(1) Ensure [sic] investigation of the following types of incidents is conducted by appropriate CF investigative organization (i.e., CFNIS):
>
> 14F(1)(A) Use of force by CF members resulting in the injury or death of a detainee.
>
> 14F(1)(B) Allegations of crimes committed by CF members against detainees.
>
> 14F(1)(C) Allegations of mistreatment by CF members of detainees.

81. While the wording of the Directive in places (notably paragraphs 11 and 14) may appear somewhat inflexible, it is the Commission's view that it must be read as a whole and interpreted reasonably in the context. As paragraph 10 of the Directive makes clear, it was not intended that full MP investigations would be launched in a mechanical fashion without regards to the facts of a particular incident. What was clearly intended, however, was that the MPs, and in particular the TFPM, were expected, when confronted with one of the scenarios indicated, to turn their minds to the need for further investigation and to appropriately document their decision in that regard.

4. Failure of MPs to Recognize Duty to Investigate Detainee Injuries

82. However, the evidence in this case indicates that there was no such assessment, let alone any actual MP investigation of the injuries to D3. This omission clearly contradicts the unmistakable expectation of the national MP technical chain as reflected in the Technical Directive.

83. In fact, none of the Roto 1 MPs interviewed by the Commission in its investigation acknowledged any need or utility in any further investigation of the injuries to D3.

84. In his interview with Commission investigators, the Detention NCO, Sgt Wall, dismissed the idea of any MP investigation of such detainee injuries, given that the MPs were operating "in a war zone." He further elaborated as follows:

> [...] if we had to stop and stop everything and launch a full-blown military police investigation on how this guy sustained injuries, whatever, on the detainees that are coming into our custody I'd probably be still in Afghanistan right now.

> It goes back to what I said earlier, people gotta realize that we're in a war over there. It's not downtown city or a base in Canada here where we're dealing with a guy that just stole a bike or drunk or whatever the case may be.

85. For his part, the MP second-in-command of the group of MPs responsible for detainee-processing, WO Simms, acknowledged to the Commission that the injuries to D3 did strike him as being somewhat atypical of usual battlefield injuries (and hence his notation in his personal notebook [redacted] which he had counter-signed by the Liaison Officer for the capturing unit). Yet, somewhat contradicting himself, he ultimately maintained that, because the detainee had just come from the battlefield, there did not appear to be any issue that would require investigation. He added:

> If the powers that be want to put an independent person there for each detainee and see fit if a police investigation is deemed, then that's up to the powers that be but we'll have to follow our own SOP and what we're mandated here to do.
>
> Having said that, I certainly wouldn't have turned a blind eye – if I seen something out of the ordinary that happened and a criminal offence took place, by a Canadian or otherwise, certainly I wouldn't turn a blind eye. But it never dawned on me that something criminal would happen with buddy coming off the battlefield.

86. Ironically, the "independent person" assessing the need for a police investigation alluded to by WO Simms appears to have been precisely what both the technical chain and the chain of command were expecting the MPs to be, particularly at the more senior level (the "independence" deriving from MPs' peace officer status, as recognized in Canadian law and in CF regulations and policies, as well as their authority, in section 156 of the NDA, to arrest service personnel regardless of rank).

87. The MP Commander of the group of MPs responsible for detainee-processing, Capt Tarzwell, indicated that the need to investigate D3's injuries did not occur to him at the time because he was preoccupied with ensuring the safety and security of his personnel vis-à-vis the detainees and with completing the transfer process. He further indicated that he accepted the explanation for D3's injuries which had been passed on from the capturing unit, given that the injuries he saw were consistent with that explanation. He also suggests that he took additional comfort from the fact that there would be the opportunity later to review the statements from the soldiers involved in the capture. Yet there is no indication,

either from Capt Tarzwell or from any other witness, that any MPs (apart from the CFNIS investigation launched pursuant to this complaint) ever reviewed the capturing soldiers' statements for the purpose of assessing the need for further investigation of D3's injuries, or had any intention of doing so.

88. In his CFNIS interview, Maj (ret'd) Fraser, questioned the validity of the 15 March 2006 MP Technical Directive on the basis that, in his view, it should have been promulgated through the relevant operational command staff (J3 MP Ops), rather than directly from the CFPM. It should be noted, however, that, while not identical, the previous MP Technical Directive for the Afghan mission from September 2005, issued by the J3 MP staff in Ottawa, contained similar direction on the need to investigate CF uses of force resulting in death or injury of a detainee.[8] Indeed, the same investigative requirement is found in the standing direction from National Defence Headquarters on the conduct of international operations going back at least to 2001.[9]

89. On a more substantive note, Maj (ret'd) Fraser asserted that he simply did not have the capacity to conduct all the investigations indicated in the Technical Directive. He also indicated that a detainee coming in beaten-up from the battlefield in and of itself would not likely have suggested to him the need to further assess or investigate the matter. Maj (ret'd) Fraser stipulated, however, that an actual allegation of detainee abuse would have been another matter, and this would have triggered consideration of the need to investigate, although he states that he would refer such an investigation to the CFNIS team at KAF in any event.

90. Maj (ret'd) Fraser declined to be interviewed by the Commission, but did agree to respond to written questions. In his answers, Maj (ret'd) Fraser again expressed doubt as to the CFPM's technical authority to direct that MP investigations be initiated in respect of

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[8] Specifically, the September 12, 2005 J3 MP Technical Directive 01/05, issued by the then J3 MP, LCol Savard, at paragraphs 7 and 10.

[9] The 2001 version of the Deputy Chief of the Defence Staff's Directive for International Operations (DDIO 2/2001), in Chapter 7 (Employment of Military Police), at paragraph 709 – 1, contains almost identical direction to the MPs as that found in paragraph 11 of the March 15, 2006 version of the MP Technical Directive for Op Archer, extracted above.

detainee-handling, which he characterized as an operational matter. Maj (ret'd) Fraser also indicated that in the absence of an allegation of wrongdoing, it would not have been appropriate for him to have launched an investigation and put MP members in harm's way.

91. In a number of respects, the foregoing evidence of the MPs involved in the processing and transfer of the detainees in this case suggests an apparent misunderstanding, and even non-acceptance, of the technical direction provided to the MPs with respect to the investigation of injuries to detainees resulting from use of force by Canadian soldiers.

92. In considering the reasonableness of the above-noted reactions of these senior MPs to the suggestion of a duty to investigate detainee injuries as stipulated in the relevant MP Technical Directive, a number of points should be borne in mind.

93. First, the technical direction provided to the TFA MPs with respect to the investigation of detainee injuries did not require that an MP investigation be launched in a mechanical fashion, without the independent exercise of local MP judgement. The Technical Directive, in paragraph 10, calls for an assessment by the TFPM, in consultation with the in-theatre CFNIS commander (though, in the event of a disagreement, the matter is to be referred up the CFNIS chain of command for decision). It is clearly contemplated (and no doubt fully expected) that situations which call for an assessment will not necessarily be deemed to require further investigation, however, there is an explicit expectation that such decisions and their reasons will be documented.

94. Second, even if an MP investigation of detainee injuries were deemed warranted, the Technical Directive did not mandate any particular scope to such an investigation. As such, the usual discretion at appropriate MP supervisory levels to determine the scope and requirements of a given investigation remained intact.[10]

95. Third, while the evidence of relevant witnesses suggests that an actual allegation of detainee abuse would likely have triggered some investigative actions by the relevant MPs –

[10] See, e.g.: MP Policies, October 2007, Chapter 6, paragraph 19: "Scope of Investigations"; and Chapter 6A, paragraph 10 "Discretionary Powers – Initial Case Evaluation" (note: the same provisions existed in the previous version of Chapter 6 of the MP Policies, issued in April 2003).

as in fact occurred later that very month[11] – the MP Technical Directive clearly intended a more proactive posture for MPs in the highly sensitive area of detainee treatment. The wording of the Technical Directive makes it apparent that appropriate MP investigative activity (which, depending on an individual MP's position in the TFA MP structure, might be as basic as raising the possible need for an investigation with a more senior MP or the CFNIS) was expected to be taken and documented not only in respect of actual allegations or complaints of wrongdoing, but also in the face of certain events, including the injury or death of a detainee attributed to CF members. Moreover, in any event, statements attributed to D3 during his medical treatment (as noted by Cpl Bertrand in his notes – see paragraph 73 above) could have been construed as a complaint.

96. Fourth, apart from the probable need to delay D3's transfer to the ANP, the required MP assessment or investigation with respect to D3's injuries need not have detracted significantly from the MPs' transfer-processing responsibilities or resources. Documentation and photographing of the injuries was already required under the transfer process per TSO 321A, as were written statements from the capturing soldiers regarding the circumstances of capture. The only additional step which would have been useful was to question D3 about the circumstances in which he received his injuries as well as D1 and D2 regarding anything they may have actually witnessed with respect to the apprehension of D3 or anything D3 may have said after capture. Moreover, these and any other investigative steps could, and in all likelihood would (given their general mandate as well as the direction provided in the Technical Directive itself), have been referred to the CFNIS.

97. Maj (ret'd) Fraser himself noted that it would have been CFNIS who would likely have been responsible for any MP investigation of D3's injuries. Ironically, Capt Tarzwell did have occasion to discuss the processing of these detainees with the in-theatre CFNIS Commander. However, the purpose of this interaction related to the failure to complete all

[11] An incident at KAF on April 22, 2006 led to a complaint against a member of the MPs about alleged rough handling of some detainees when being handed off by MPs who had brought the detainees in from the field. The complaint was immediately referred to the CFNIS for investigation and, indeed, additional CFNIS investigators were brought in from Canada to assist with the case. The investigation concluded that the complaint was not substantiated and that no wrongdoing had occurred.

steps in the transfer-processing per the TSO (to be addressed in the next section of this report) and raised no issue with respect to D3's injuries.

98. Thus, while the CFNIS Team at KAF offered a potentially useful resource to the MPs in addressing investigative requirements arising from the latter's detainee-processing responsibilities, since the MP leadership of the MPs responsible for detainee-processing and the TFPM himself failed to engage or even to advise the CFNIS of any detainee injuries in this case, the CFNIS was obviously precluded from providing any assistance to the MPs or from discharging its mandate in this matter.

99. In light of the foregoing points and the evidence of various witnesses, the apparent disinclination of the MP leadership to perform their investigative/law enforcement role as intended by the MP Technical Directive suggests two distinct problems in some MPs' understanding of their role in the context of military operations:

a. a failure to fully appreciate the special significance of the CFPM's technical authority in MP "policing" matters, such as law enforcement investigations; and,

b. a failure to appreciate that MPs' law enforcement mandate, and their concomitant susceptibility to applicable technical direction in that regard, is constant and is not somehow held in abeyance when assigned to roles, such as prisoner-of-war/detainee handling, which some deem not to be of a law enforcement nature.

5. The Nature and Origins of the CFPM's Technical Authority

100. In understanding the nature of the CFPM's technical authority, and indeed the nature of the MP technical chain itself, the first point to note is that the CFPM is not in a command relationship with the TFPM or the rest of the TFA MPs. These MPs are under the command of the TFA Commander. In terms of MPs posted to Afghanistan, the CFPM only has a command relationship with the members of the CFNIS. However, as the head of the MP technical chain, the CFPM is authorized and indeed required to provide guidance on the

manner in which tasks specific to (though not necessarily exclusive to) MPs should be performed by them.

101. In the CF, a technical chain is a hierarchical network of military personnel, distinct from and parallel to the chain of command, assigned to a given military occupation which requires specialized training, and which has been formally authorized to provide for guidance and accountability related to the field of specialization. The Minister of National Defence has authorized a technical chain for MPs in the CF.[12]

102. The CFPM, and the MP technical chain as a whole, provide technical advice to the chain of command and technical guidance and direction to MPs serving therein, on a range of MP duties. However, as he does not command those MPs posted to positions within the operational military chain of command (i.e., MPs other than those posted to, e.g., the CFNIS, the various directorates within the office of the CFPM, the MP Academy, and the CF Service Prison and Detention Barracks), his technical direction to them does not constitute, or have the same legal force as, an order. Arguably, MPs cannot be charged with the service offence of disobeying a lawful command for violating the CFPM's technical direction.

103. For those unfamiliar with the structure of the MP branch of the CF and its relationship to the operational chain of command, the foregoing distinction between command and technical authority may itself be confusing. However, the matter becomes still more complicated and nuanced, because the technical guidance provided by the MP technical chain is not uniform in the authority which it carries; rather, it varies depending on the nature of the MP function in question, a fact which is apparently confusing even to some MPs and other CF members.

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[12] This fact is noted in the MP Policies as well as in the MP Technical Directive for the mission. The indicated rationale for this arrangement is "to enable investigative consultation and direction to be provided to deployed MP. This is to ensure the independence of investigations, maintenance of professional standards and to satisfy judicial requirements. The intent is to provide the military justice system with impartial and effective investigative support."

104. On certain subjects, even though MPs may be the recognized technical experts on the matter within the CF, the CFPM's guidance is merely advice to the chain of command and to the MPs serving therein. However, on matters considered to be "policing" matters – which naturally includes MPs' law enforcement and investigative duties – the CFPM's technical direction is more authoritative.

105. In the context of the relevant MP Technical Directive applicable at the time of the events in question, the CFPM's directions on the need for at least an investigative assessment regarding detainee injuries, while reiterated elsewhere, appear under the heading "Investigations". Set out in this manner, it is apparent that the CFPM was purporting to provide technical *direction* on a "policing" matter, rather than merely *advice* on a non-policing aspect of MP operations.

106. The reason for this heightened authority of MP technical direction in "policing" matters, such as offence investigations, is a function of the special role played by MPs in law enforcement within the CF and the need to ensure the integrity of that process and the broader military justice system.

107. The rationale for MPs' law enforcement duties, such as the investigation of possible service and criminal offences, stems from the fact that CF members are at all times subject to the CF Code of Service Discipline, which includes by referential incorporation, all Canadian criminal law as well as Canada's international humanitarian legal obligations under the Third Geneva Convention. Thus, even when serving in military operations outside Canada, Canadian soldiers are subject to Canadian law in respect of their actions. This arrangement directly supports a key premise of the Rule of Law (a fundamental organizing principle of Canadian law and government), that no one in society is above the law. The role of MPs in providing law enforcement services within the CF serves to help make the legal accountability of Canadian soldiers a reality.

108. However, the provision of law enforcement services in a fair and legitimate manner which satisfies Canadian legal requirements and fully supports the Rule of Law demands that those charged with such responsibilities, i.e. the police, be authorized to act in accordance with their individual judgment in certain respects. The necessary independence

held by individual police, as peace officers under common law and later at statute, has been well recognized by the courts. In the performance of their specific law enforcement duties, police, as peace officers, are deemed to be servants of the law and not of the particular entities which employ them.[13] So, for instance, in the exercise of certain investigative and enforcement powers – such as the conduct of searches, the making of an arrest, the laying of a charge – the law requires that the individual peace officer taking such action possess a genuine and personally-held belief as to certain facts. No one may direct a peace officer in respect of the holding of such a belief, or direct that a peace officer exercise the associated legal power on their own authority in the absence of such a belief.

109. Peace officer status is now governed by federal statute, namely section 2 of the *Criminal Code*, and Canadian Forces personnel who are "appointed for the purposes of section 156 of the *National Defence Act*" are among those so designated. Section 156 of the NDA, in turn, contemplates the appointment, in accordance with the regulations, of particular officers and members of the CF as military police members. As such, in the context of their law enforcement role, MPs in the CF are required to exercise the same independence of judgment, as described above, as their civilian police counterparts.

110. However, even before peace officer status was conferred on MPs under the *Criminal Code*, it was legally recognized that their law enforcement duties required a special degree of independence from the chain of command. Hence, the power historically conferred in NDA section 156 and its predecessor provisions for MPs to arrest other CF members, regardless of rank, in respect of service offences.

111. In addition to possessing the independence necessary to personally form the grounds required for the exercise of certain investigative and enforcement authorities, peace officers are also imbued by the nature of their office with a certain discretion in the exercise of those authorities. Having the necessary legal grounds for a certain policing action is one thing, deciding whether to take the authorized action is another. This latter form of policing

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[13] The leading common law jurisprudence enunciating this proposition is canvassed in Justice Binnie's decision for a unanimous Supreme Court of Canada in *R. v. Campbell*, [1999] 1 S.C.R. 565, at paras. 27-36

discretion can, and indeed must, be subject to appropriate superior guidance and direction in the interests of fairness and the Rule of Law, but only by other police professionals. Hence the legitimacy and necessity in the CF of the guidance and direction provided to MPs by the MP technical chain.

112. It is also worth noting that, when it comes to the performance of law enforcement duties, the CFPM can ultimately enforce his technical authority with his power to revoke an MP's credentials (the MP badge and identification card) the holding of which are necessary for the retention of the MP's peace officer status and special MP powers of arrest under NDA section 156.

113. The very existence of the MP technical chain and the direction and standards it is authorized to set for the execution of MP law enforcement duties is itself evidence of the recognition of the special nature of such duties. Further recognition and reinforcement of the necessary independence, both of individual MPs in the exercise of their professional discretion and judgment as peace officers and of the MP technical chain which supports this professionalism, is found in certain various landmark changes to Canadian military policing which occurred in the 1990s:

a. the creation of the CFNIS, a specially-formed national MP investigative unit with a mandate to investigate serious and sensitive cases, under the command of the CFPM, with the exceptional (for MPs when not exercising command authority) authority to lay charges under Code of Service Discipline;

b. the Accountability Framework between the CFPM and the senior officer to whom he reports, the Vice Chief of the Defence Staff (VCDS), which seeks to ensure that the CFPM's accountability to the chain of command does not compromise the necessary professional independence of the CFPM, both as head of the MP technical chain and as commander of the CFNIS in respect of service or criminal offence investigations and other law enforcement responsibilities; and

c. the legislative enactment of the MP complaints process (NDA Part IV), and in particular the creation in statute of an independent civilian body, this Commission, to provide external oversight to this process, as well as the formal recognition in law of the concept of improper interference in MP investigations and the establishment of a formal complaint mechanism in this regard to which all CF members and senior DND officials are subject.

114. Of course, such mechanisms aimed at protecting necessary MP investigative independence are of no avail if MPs themselves do not recognize and try to perform their duty as peace officers and specially-appointed persons under NDA section 156.

115. The foregoing analysis of the special nature of MP law enforcement duties and, concomitantly, of the mandate of the MP technical chain, leads to the proposition that the CFPM's technical direction with respect to matters requiring investigative action by MPs, as embodied in his March 15, 2006 MP Technical Directive (Op Archer), should have been considered as effectively binding on the TFA MPs, unless in conflict with valid orders from the chain of command.

6. Chain of Command Perceptions and Expectations

116. In this case, a review of the relevant Theatre Standing Orders (TSO 321A), as well as relevant witness statements and documentary evidence, strongly indicate that the CFPM's direction for MPs to initiate and document investigative activity in respect of detainee injuries attributed to uses of force/application of rules of engagement by CF members, was perfectly consistent with both the orders and expectations of the chain of command.

117. As a general matter, in the detainee-processing stipulated in TSO 321A, there is considerable emphasis placed not only on the humane treatment of the detainees, including the provision of any necessary medical care, but also on the documentation and recording (including by photographs) of the physical condition of the detainee at the time of transfer processing and, in particular, the nature and extent of any injuries. However, the purposes of the recording and documentation requirements, contained in the TSO, in respect of detainee injuries appear to go beyond what is necessary to facilitate medical treatment, or

even to provide a record of the detainee's condition at the time transfer as protection against a future complaint or legal claim against the CF.

118. The TSO expressly requires MPs to photograph and document any detainee injuries, over and above that which is already required of medical staff at KAF.[14] The TSO also requires that when medical staff notice injuries on detainees being examined they are to notify the MPs in addition to maintaining a medical file on the injuries.[15] Thus, the TSO appears to anticipate a distinct MP interest in detainee injuries. Since the nature and extent of detainee injuries is already being documented for other purposes in connection with the transfer process and given the specific emphasis on MPs seeing and recording the injuries first-hand, it can only be concluded that there was an expected investigative interest.

119. Among the CFNIS interviews reviewed by the Commission, was that of Maj Cruikshank, who in April 2006 was the TFA Duty Officer at the National Command Element[16] operations centre. Maj Cruikshank worked closely with the TFPM, Maj (ret'd) Fraser, on reports to the chain of command regarding detainee matters, and had some specific recollections about the transfer-processing of the detainees in this case. He stated that the injuries to D3, as indicated by Maj (ret'd) Fraser, did cause him some concern and moreover, that he assumed that Maj (ret'd) Fraser "would have done some kind of investigation, or asked some questions as to what happened."

120. For his part, the TFA Commander at the time, BGen Fraser, indicated to Commission investigators that he would have expected the TFPM to initiate an investigation if there was anything that caused him concern with respect to a detainee's injuries. In this instance, BGen Fraser recalled the TFPM, Maj (ret'd) Fraser, informing him that the injuries to the detainee (i.e., D3) resulted from an application of the rules of engagement at the time of capture, and that the TFPM seemed comfortable with the situation.

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[14] TSO 321A, Annex G, section 1, part a, paragraph (1)b and e.
[15] TSO 321A, Annex I, section 4.
[16] At this time, the Commander of Canada's TFA, BGen Fraser, was also serving as the overall ISAF Commander for the southern Afghanistan region. The National Command Element, under the command of the Deputy TFA Commander, refers to the separate headquarters at KAF specifically devoted to Canadian chain of command matters.

121. At the next level in the chain of command, at CEFCOM headquarters in Ottawa, the Chief of Staff for Operations at the time, BGen Laroche, indicated in his interview that, as far as he was concerned, visible injuries of the nature indicated on a detainee arriving at KAF should have automatically caused MPs to enquire into the causes of the injuries. He also observed that while all CF members have a responsibility to report suspected mistreatment of detainees, it was expected that MPs would have a better sense of what injuries would be suspicious.

122. BGen Laroche's reaction to the scenario presented in this case is more categorical than BGen Fraser on the need to investigate the types of injuries which D3 presented, as BGen Fraser appears to rely on the TFPM having some concern about the injuries as a trigger for MP investigative activity. However, it is apparent that BGens Fraser and Laroche were not familiar with the contents of the MP Technical Directive and were describing their own minimum expectations for the TFPM as to when the need should arise for the opening an MP investigation file. There is nothing in the evidence of these officers that would suggest any problem or conflict with the more robust and proactive threshold set by the CFPM in the MP Technical Directive.

123. In fact, there were considerable indications, even at the time, of great sensitivity on the part of the chain of command about the need to ensure proper treatment of detainees in CF custody and to avoid being left vulnerable to allegations of abuse. The then CDS, Gen Hillier, had publicly described detainee mistreatment as something that could result in the "strategic failure" of the Afghan mission. BGen Fraser also alluded to this in his Commission interview.

124. Other evidence confirms that proper detainee treatment was very much a preoccupation of the chain of command at the time of the events related to this complaint. In an email message on the Monday following the detainee-transfers in this case (April 10, 2006) from CEFCOM Operations staff member, Maj Cummings, to the TFA Operations Duty Officer, Maj Cruikshank, TFA received feedback on its processing and transfer of the detainees over the weekend. It should be recalled that these were the first detainees to go through the transfer process at KAF. The focus of the email was to prioritize the type of

information which CEFCOM wished to receive soonest and to emphasize the need for speed in the passage of same, even at the expense of accuracy. The message ends by stating that:

> Intent is to ensure due diligence in the handling of detainees [in accordance with] our national policy (TSO). As a reminder (we have discussed many times), CDS has said that strategic failure in Afghanistan could easily stem from inappropriate handling of detainees, [redacted] [...] to highlight the level of reporting on this subject. Given our sensitivities in Detainee Handling, we need to be clear on who is doing what to whom (i.e., nationality and organization) throughout and why.

Although not an addressee on the message, Maj Cruickshank, in his CFNIS interview, indicated that he would likely have shared its contents with the TFPM. For his part, Maj (ret'd) Fraser indicated to the Commission that he did not recall seeing any emails from Maj Cummings. Given the TFPM's prominent role, the process and their mutual collaboration in the passage of detainee-related information to CEFCOM, it seems highly improbable that Maj Cruikshank would not have shared the email message with the TFPM.

125. The inclination to scrutinize the circumstances of detainee injuries attributed to CF members was also apparent on the part of the commanding officer of the capturing unit. This officer conducted interviews with the soldiers directly involved in the altercation with D3. He advised Commission investigators that he was able to satisfy himself that the operation was conducted in accordance with the rules of engagement and his own expectations, and that if he had had any concerns that their actions required investigation, he would have advised the MPs. However, for his part, the CEFCOM Chief of Staff for Operations, BGen Laroche, told the Commission that it was not advisable for commanders to conduct internal investigations into matters which potentially involve criminal or service offences. In such instances, it was preferable, in BGen Laroche's view, to refer the matter to an external body, such as the CFNIS.

126. A high level of sensitivity among the chain of command regarding the need to ensure proper detainee treatment should hardly seem surprising. The scandal and outcry over the abuse of prisoners by US forces in Iraq in 2004 caused considerable damage to the American military mission in that country. Moreover, Canada's own earlier experience with a scandal over military detainee mistreatment in Somalia in the 1990s was, and is, still fresh in the minds of many of the senior leadership of the CF. It may be recalled that incident led,

not only to a number of courts martial, but also to a public inquiry and other public reviews of military policies and procedures, the disbandment of the Canadian Airborne Regiment, and an overhaul of various laws and policies governing the CF with particular emphasis on military justice and policing.

127. It is to be presumed that the chain of command's interest in proper detainee-handling is broader than the understandable desire to avoid past mistakes and any associated adverse news media coverage. There is a general imperative of ensuring compliance with Canada's international legal obligations in the humane treatment of prisoners of war and other military detainees, both for their own sake and for the sake of Canada's international reputation, and also to try to encourage reciprocal behaviour on the part of the enemy. Also, in the context of the Afghan mission, one should also consider the particular objectives on the part of ISAF and Canada assisting and mentoring Afghan officials in professionalizing their law enforcement and security institutions in areas such as respect for human rights. Moreover, the success and ultimate value of military operations can themselves be compromised by perceptions of detainee mistreatment, and especially if there is any suggestion of the same being condoned by foreign military forces, such as the CF, who operate in Afghanistan at the invitation of the host nation.

128. Therefore, even apart from the specific technical direction provided by the CFPM on the issue of investigation of detainee injuries, consideration of the legitimate and apparent interests of the chain of command on this issue should itself have underscored the need for MP diligence in this area. Nor should anyone perceive an inherent contradiction between, on the one hand, the need for MP independence from chain of command interference in respect of MP law enforcement duties, and, on the other hand, the need for MPs to consider the interests and objectives of the chain of command as these may be implicated in the performance of these duties. In fact, the lack of any such conflict is expressly addressed in the CFPM's standing direction to MPs in the performance of their policing duties. One of the key "ethical principles" for the conduct of MP investigations, as stipulated in the MPPTP's chapter on investigations is that "investigations and other law enforcement

activities must be conducted in such a manner, within the law, that facilitates and supports the Commander's legitimate mission, and reinforces military values."[17]

129. In fairness, it must be observed that the type of overarching objectives and interests as discussed above can be overlooked if too much emphasis is placed on short-term concerns, such as the speed of the transfer process and the reporting of information on the same up the chain of command. As will be explored in greater detail in the next section this report, the chain of command placed considerable pressure on the TFPM and his MPs to accomplish the processing and transfer of the detainees in question with the greatest possible dispatch, even to the point where speed appeared to be an end in itself. However, the Commission's investigation indicates that this pressure did not play a significant role in the MPs' failure to investigate, as there seems not to have been any inclination to do so in any event.

130. For the same reason, the evidence indicates that the failure to initiate an MP investigation was not motivated by any desire to cover-up possible wrongdoing by CF personnel. There is no evidence to indicate that the MPs at KAF had suspicions or concerns about the injuries to D3 as would lead to such a motivation.

7. Contributing Systemic Factors

131. Unfortunately, there were no apparent checks in place to ensure timely oversight of this type of omission on the part of the TFPM, and those that existed did not work for a variety of reasons.

132. Intended oversight of such actions and decisions on the technical/MP side seemed to depend on consultations between the TFPM and the in-theatre CFNIS Commander. Such a process provided the opportunity for a change of position by the TFPM, or, in the event of continued disagreement, a referral of the issue up the CFNIS chain of command for a decision. At the very least, the process of TFPM-CFNIS consultation made it far more likely that a decision not to investigate, with supporting reasons, would be recorded in a

[17] MPPTP, Chapter 6, paragraph 8b.

manner that it would come to the attention of higher levels in the MP technical chain. It should be noted here that the intended forum for recording such decisions – the Security and Military Police Information System (SAMPIS), which would have enabled ready access by senior MP technical authorities, such as the CFPM himself – was deemed not to have adequate security features so as to be suitable for use in-theatre. Of course, it was incumbent on the MP leadership, both in-theatre and throughout the technical chain to work around this limitation and fulfill the spirit of the requirement to document and render accessible such decisions in a timely manner.

133. In this instance, the TFPM's apparent perception that no duty even to consider an investigation arose from the events in question precluded any consultation with CFNIS or the recording of a decision on the matter.

134. On the CF chain of command side, the problem appears to have been the reverse: a lot of information was being communicated to them at regular intervals; however, there was no systemic orientation to perform timely quality-control on such decisions. For one thing, meaningful review of a TFPM's decision not to investigate something realistically requires that such a decision be brought to the chain of command's attention. In the absence of a specific reporting requirement on such matters, the most likely way this would happen would be on the initiative of the MP specialist advisor attached to higher command headquarters. However, there did not seem to be a consistent degree of engagement of MP advisors at the higher command levels of the CF in respect of the processing and transfer of detainees. Notwithstanding the heavy involvement of MPs on the ground in-theatre conducting these processes, particularly at KAF, they tend to be viewed within the CF as essentially a continuation of the field operations resulting in the capture of the detainees and, as such, an issue for military operations staff (i.e., J3).

135. Systemic factors aside, however, it is also fair to observe in the context of the processing and transfer of the detainees at issue in this case, that the chain of command was significantly focussed on maximizing timeliness, both in the actual accomplishment of the processing and transfer of the detainees, and also in the ongoing reporting of information on the detainees and their status in the transfer process. No doubt, higher command

headquarters was itself under considerable pressure to provide frequent updates to senior military and political officials.

136. Although the point will also be addressed in the context of the analysis with respect to the next allegation, it should be noted here, given the hypothesis advanced by the complainant, that the Commission found no evidence to indicate that the pressure to quickly transfer the detainees in this case was specific to these detainees or had anything to do with the injuries reported.

137. However, even once the detainees were actually out of Canadian custody, there did not seem to be any inclination to analyze the full detainee file from a quality-control perspective in spite of the fact that these were the first detainees to be processed at KAF.

138. In any event, neither the failure of the TFPM to address the need for an MP investigation of D3's injuries, nor the failure to complete all of the transfer-processing steps stipulated in Theatre Standing Orders (which is the subject of the next section of the report), appears to have been detected by the chain of command or the MP technical chain until the time the allegations of the complainant were publicly raised, some ten months later.

139. In light of the foregoing, it is all the more ironic that the need for further enquiry or investigation regarding the injuries to D3 was flagged by a DFAIT official, with no background either in the military or in policing. This official had been one of twelve recipients of an email sent on April 10, 2006 from DND's Directorate of Peacekeeping Policy (D PK Pol). The purpose of this email was to forward information on the detainees and their transfer to those at DFAIT who had involvement or interest in the notification of the International Committee of the Red Cross (ICRC) of the capture and transfer to Afghan authorities of the detainees, such notification being a DFAIT responsibility. The email included the names of the detainees, date of capture and date of transfer to Afghan authorities, and a brief description of each detainee's physical condition.

140. The email's description of D3's physical condition merely indicated "lacerations on face, swollen eyes, and contusions on arms, back and chest," struck DFAIT's Deputy Director for UN Human Rights and Humanitarian Law Section (UNHRHLS) as being

atypical of battlefield injuries. After discussing the matter with her superior, this official sent a reply email on April 12, 2006 to D PK Pol at NDHQ and to all recipients of the April 10 message. The message would turn out to be rather prescient. It requested from DND further details as to:

> [...] how and when the specific injuries of the three detainees were received (e.g., were they resisting arrest)? We would like to be satisfied that no allegations of mistreatment will arise against the CF as a result of these arrests, detentions and transfers.

141. There was never a reply to the email of the DFAIT official. Nor does there appear to have been any follow-up within DND. DND's D PK Pol Director at the time felt that it was inappropriate for the DFAIT official to query and second-guess the CF chain of command on a military matter such as this. Indeed, it would appear that the only action taken as a result of the April 12, 2006 email from the DFAIT official was an effort by the D PK Pol to communicate indirectly, through a mutual DFAIT colleague, the unwelcome nature of the DFAIT official's intervention. For her part, the DFAIT Deputy Director for UNHRHLS advised the CFNIS during her interview that her purpose in sending the email was to ensure appropriate "due diligence" was demonstrated, rather than reflecting any personal belief that there had been abuse or mistreatment of the detainee by CF personnel.

142. This reaction and apparent purpose on the part of this DFAIT official in suggesting the need for further inquiry regarding the detainees' injuries, would seem to precisely coincide with the philosophy underlying the MP Technical Directive's in this regard. After all, as the MP Policies observe in their discussion of investigative ethics, the purpose of investigations is as much to exonerate as it is to implicate.[18]

Finding #3:

The Commission finds that there was a failure by the military police (with the exception of the National Investigation Service members who were present, but not informed or engaged) to investigate the origins of the injuries of one of the detainees, when it was their duty to do so.

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[18] MPPTP, Chapter 6, paragraph 8. While this point was only explicitly included in the most recent version of the policies, issued in October 2007, in as much as such an attitude is implicit in the notion of a fair and unbiased investigation, this ethical point should be considered as reflective a pre-existing tenet of investigative ethics, rather than as a subsequent innovation in the field.

Finding #4:

The Commission finds that the failure to investigate the origins of the detainee's injuries was in no way related to the concealment of mistreatment of detainees by members of the Canadian Forces, but rather it was attributable to a general failure, ultimately the responsibility of the Task Force Provost Marshal, to:

a) Understand the immutability of their policing duties and responsibilities even while deployed in an operational theatre;

b) Recognize the role of the Canadian Forces Provost Marshal as the senior technical authority in respect of policing matters, notwithstanding and independent of the operational chain of command, and to respect the directions issued by that office; and,

c) Comply with the clear expectations of senior operational commanders regarding vigilance over the treatment of detainees to be performed by the military police.

E. Failure of MPs to Complete Detainee-Transfer Procedures (Allegation 3)

143. This part of the report responds to the complainant's allegation of negligence on the part of the MPs at KAF "in safeguarding evidence, and particularly the decision by MPs to transfer the 3 injured men to the Afghan National Police ahead of a forensic medical examination to inquire into the nature of their injuries." However, as the complainant expressly raised the possibility of "other wrongful acts or omissions by the MPs" of which he was unaware due to the censoring of the documents provided to him under the access to information process, the Commission will also address herein the related issue of the failure to complete the detainee-transfer process as stipulated in the relevant TFA Theatre Standing Orders.

144. From his letter of complaint, it is apparent that in his allegation regarding the failure to safeguard evidence, the complaint is referring to evidence of abuse of the detainees by CF personnel. However, the need to safeguard evidence of such abuse would only have arisen if a need to investigate the injuries to the detainees had been recognized by the MPs. As indicated in the previous section of the report, this did not occur and, therefore, this alleged omission is really subsumed in the alleged failure to investigate, which has already been addressed.

145. The complainant's specific suggestion that "forensic medical examination" of the detainees' injuries was precluded by the MPs' decision to prematurely transfer the detainees is, of course, merely a particularization of his allegation that the MPs failed to safeguard evidence of detainee abuse. As such, it is also, in the circumstances, redundant to the issue of the MPs' failure to investigate the detainee injuries, addressed in the previous section. Nonetheless, a few points should be made in response to this aspect of the allegation.

146. A review of the letter of complaint as a whole reveals that the suggestion of a failure to allow for a "forensic medical examination" of the detainees flows from the complainant's premise that there had been no medical examination of the detainees at KAF which, in turn, was based on the fact that the copies of the detainee medical forms provided in response to his access to information request appeared to be blank. However, as noted above in respect of the complainant's second allegation regarding inhumane treatment of the detainees, this premise is incorrect. The copies of the medical forms provided to the complainant only appeared to be blank due to problems with the photocopying. In reality, they had been filled in and the detainees had received thorough examinations and, in the case of D3, apparently exemplary medical treatment – all documented photographically as well as in writing.

147. It should also be noted that, contrary to the complainant's interpretation, the medical examination contemplated in the TFA detainee-transfer process is not "forensic" in nature. A forensic examination, though it may be performed by or with the assistance of a physician, is by definition an investigative procedure, rather than a medical one. However, the medical examination and treatment provided to detainees at KAF are a function of the CF's responsibility for the detainees' well-being while in their custody; they are not done for investigative purposes. Of course, the photographic and written records of the physical state of the detainees while at KAF, as generated by both the MPs and the medical staff, do offer a record against which any subsequent issue regarding the condition of the detainees prior to transfer may be assessed.

148. As such, it is not accurate to characterize the medical examinations of the detainees required under the relevant TFA Theatre Standing Order as being forensic in nature, such that the failure to complete one necessarily implies an attempt to cover-up evidence of an

offence. In any event, as already indicated in respect of the previous allegation addressed in the report (failure to investigate the cause of detainee injuries), the Commission's investigation revealed no evidence of a cover-up on the part of the MPs. Rather, the MP failure was in not recognizing that there was anything in respect of which an investigation was worth even considering.

149. Although, as already indicated, the detainees were in fact medically examined at KAF, the proper characterization of such examination is still pertinent since, as it turns out, the MPs did forego a further medical examination of the detainees prior to their transfer. As noted previously, an "exit medical" exam was not directed in the relevant TFA Theatre Standing Order, the MPs had incorporated this step into their intended transfer process, presumably as a "best practice". Given that the medical examination of detainees at KAF per TSO 321A was to take place on arrival, a further examination following completion of identification procedures and intelligence questioning, and just prior to leaving Canadian custody would be useful, especially where the processing of the detainee had taken some time. In addition to the possibility of a change in the detainee's health during pre-transfer processing, such a step offers a more recent record of the detainee's medical condition against which to assess any subsequent issue as to the detainee's condition following pre-transfer processing and immediately prior to transfer. In the case of these detainees, however, the entire duration of their temporary detention at KAF was about [redacted] hours, therefore, the completion of an exit medical exam, absent any indication of any deterioration in the detainees' health, does not seem to have been a serious omission in this instance.

150. Of greater concern, however, is the fact that only one of the detainees, D1 was fully processed in accordance with the relevant TFA Theatre Standing Order. D2 went through the identification procedures, but the tactical questioning was interrupted in order to effect the transfer to the Afghan National Police, following their arrival at KAF. In the case of D3, as he was sedated for medical reasons in connection with his injuries, he was not subjected to the prescribed identification procedures, notably fingerprinting [redacted] nor was any tactical questioning conducted.

151. Thus, in the cases of D2 and D3, the MPs handed over the detainees to the Afghan National Police without really knowing who was in their custody and their significance, from a military intelligence perspective.

152. This failure was the cause of considerable frustration among the relevant MP leadership, not only because of the foregoing result, but also because the decision to forego the relevant steps in the processing of the detainees implicitly undermined the perceived significance of the work they were doing in connection with the detainee-transfer process and the systems they had worked hard to establish in order to effect the policies and expressed intent of the chain of command.

153. The failure to complete the above-noted steps prior to transfer were noted by the MPs themselves on the detainee-transfer checksheet which was filled out for each detainee and filed with the various forms prescribed in TSO 321A – all of which was [redacted] to CEFCOM Headquarters in Ottawa. In respect of the steps missed, for example in the case of D3, the following notations were recorded at the appropriate points on the checksheet, apparently by Sgt Wall: "Transfer medical: not conducted due to push to transfer"; and "Detainee was not processed or interviewed due to his medical condition. Unable to process due to the wish from higher insisting on his transfer prior to being processed or undergoing a release medical." The inability to complete the tactical questioning of D2, or even to commence such questioning of D3, prior to the transfer out of the detainees is also confirmed by the CF personnel who had attended the TFA MP compound in order to interview the detainees. Moreover, the recordings of their tactical questioning interview with D2 record Capt Tarzwell interrupting the interview in order to effect the transfer of the detainees to the Afghan National Police.

154. In his CFNIS interview and in his written answers to questions from the Commission, the TFPM, Maj (ret'd) Fraser, points to two factors which motivated him to effect the detainees' transfer to the Afghan National Police prior to the completion of the pre-transfer procedures set out in TSO 321A: 1) relentless pressure from the chain of command to transfer the detainees as soon as possible; and 2) the timing of the arrival at KAF of the Afghan National Police members to pick up the detainees.

155. The Commission found ample evidence to corroborate the pressure on Maj (ret'd) Fraser to get the detainees out of Canadian custody as quickly as possible. Maj Cruikshank, the National Command Element Duty Officer, served as a conduit between CEFCOM operations staff in Ottawa and the MPs in such situations. In his CFNIS interview, Maj Cruikshank confirmed CEFCOM's emphasis on quick time lines for detainee transfers and the attitude that CEFCOM and presumably even higher levels in the chain of command did not want the detainees "in our possession any longer than we had to have them." The CEFCOM Provost Marshal at the time, Maj Rowcliffe, in his interview with Commission investigators, confirmed that the pressure to move detainees out quickly was a common theme. Indeed, the CEFCOM Commander, LGen Gauthier, himself confirmed this to Commission investigators.

156. Moreover, this constant pressure to expedite the process was translated down the chain of command to the MPs conducting the pre-transfer processing. The MP second-in-command of the group of MPs responsible for detainee-processing, WO Simms, in his interview with Commission investigators, recalled getting phone calls "every couple of minutes" when there were detainees in the compound. The calls would be from the TFPM, Maj (ret'd) Fraser, Commander of the National Command Element, Col Putt, or the Duty Officer at the Operations Centre, Maj Cruikshank, and would be urging haste or seeking yet another update on the status of the process.

157. The sensitivity of, and pressure from, the chain of command on the timing issue is also reflected in the TFPM's quick action in trying to initiate contact with the Afghan National Police in order to arrange for the transfer of the detainees. Indeed, the evidence indicates that Maj (ret'd) Fraser began trying to contact the Afghan police for this purpose prior to the detainees' actual arrival at KAF, at approximately [redacted] Maj (ret'd) Fraser indicated to the Commission that the early start to the efforts to contact the ANP was directed by the chain of command.

158. However, it soon became apparent that the police would not be arriving for a few more hours to pick up the detainees [redacted]. Maj Cruikshank recalled in his CFNIS interview that when this fact was related by

him and Maj (ret'd) Fraser to Col Putt, the latter expressed displeasure because he knew this added delay would cause consternation back in Ottawa.

159. Yet, when the ANP members finally arrived at KAF at [redacted] only one of the three detainees had been fully processed and interviewed in accordance with Theatre Standing Orders. Of course, it must be recognized that, these being the very first detainees to be processed for transfer at KAF, the TFPM and the MPs would not have a very definite idea of how long the processing would take.

160. However, given the uncertainty as to how long the pre-transfer processing, including medical treatment and tactical questioning, would actually take, it is surprising that the process of requesting the ANP to pick up the detainees should have commenced so early on in the sequence of events. It is also surprising that there seemed to have been no contingency to deal with the presumably likely scenario of the pre-transfer processing not being completed by the time the relevant Afghan security forces would have arrived to pick them up.

161. There is no indication in the evidence of any attempt to contact the ANP prior to their arrival at KAF in order to advise that they were not quite ready to hand over the detainees. At the same time, both Sgt Wall and Maj (ret'd) Fraser indicated that [redacted] Either for this reason, or else simply due to the overall pressure on timing being exerted by the chain of command, or some combination of the two, there appears to have been no consideration given to the possibility of having the ANP members wait for the detainee processing to be completed. There is also no evidence of any consideration given to transferring only D1 and D2 at that time and holding on to D3 until he could be processed and interviewed.

162. As a whole, the evidence of those involved suggests that the TFPM's intention in the circumstances was to effect the transfer of the detainees as soon as the ANP arrived to pick them up, regardless of the extent of pre-transfer processing completed at that time. Indeed,

in his written answers to the Commission's questions, Maj (ret'd) Fraser confirmed this to be the case.

163. While Maj (ret'd) Fraser's superiors in the chain of command all acknowledge the pressure to effect detainee transfers with all possible speed, they also made it clear that they had no expectation that this would be achieved at the expense of any steps in the pre-transfer processing. They further indicated that they would have expected to have been advised by Maj (ret'd) Fraser or Col Putt that the time pressures made completion of the TSO 321A procedures impossible. The TFA Commander, BGen Fraser, indicated that he would have relied on the TFPM to bring such a problem to his attention. In his interview with Commission investigators, BGen Fraser described Maj (ret'd) Fraser as his "agent to make sure the process was adhered to." Similarly, the CEFCOM Commander, LGen Gauthier, advised that it was never the intention that the pressure on timelines would override the detainee-processing requirements.

164. Maj (ret'd) Fraser indicated to the CFNIS that he did raise concerns, both with Col Putt and repeatedly with Maj Gribble (deputy to LCol Savard, the Strategic Joint Staff Provost Marshal at NDHQ). Moreover, there was evidence that the constant pressure to speed up the transfer process did relent somewhat, or become more flexible during the course of Roto 1, which ended in August 2006.

165. The evidence indicates, however, that with respect to the transfer of these particular detainees, there was no attempt made by the TFPM, Maj (ret'd) Fraser, to specifically draw to the attention of the chain of command that, as a consequence of effecting the transfer at the earliest possible moment (i.e., when the ANP members arrived at KAF), certain steps in the pre-transfer processing would not be done. Nor is there any evidence that Maj (ret'd) Fraser received a specific order to bypass any of the pre-transfer processing procedures. Indeed, Maj (ret'd) Fraser indicated to the Commission that there was no such order. In these circumstances, and in the absence of specific orders to the contrary, it was clearly Maj (ret'd) Fraser's duty to follow the specific written directions of TSO 321A, rather than to simply succumb to the verbally-transmitted and generalized pressure to expedite the transfer process.

166. There is no doubt that the constant pressure from the chain of command, both on timing and to provide frequent updates on the status of the situation, would have made the TFPM's job considerably more difficult, likely more so than it had to be. It is also possible that through this degree of pressure, the chain of command may, however inadvertently, have caused the TFPM to second-guess the overall importance of the TSO processing requirements and therefore to consider at least some of it to be expendable in the interests of timeliness.

167. At one point in his CFNIS interview, Maj (ret'd) Fraser requested sympathy for the chain of command's "overarching interest" at the "strategic" level to ensure that detainees were in Canadian custody for the least possible amount of time (i.e., in order not to become fixed with the full obligations of a "detaining power" under the Geneva Conventions). In his role as TFPM, however, his focus should have been on ensuring that the pre-transfer procedures assigned to his responsibility were completed properly and as expeditiously as possible, rather than on "strategic" interests. Indeed, this was also apparently the chain of command's expectation of the TFPM.

168. The Commission's investigation revealed another deficiency in the MPs' execution of the Theatre Standing Order procedures for detainee transfers. The TSO expressly stated that certain records, including the written statements of CF members regarding the circumstances of the detainee's capture, were to be provided to the Afghan security agency receiving custody of the detainee. However, these were not given to the ANP in this case.

169. It is true that the written statements from the capturing unit did not arrive at KAF until the next day when the detainees had already been transferred (which is itself less than optimal [redacted] which is obviously not the fault of the MPs. However, even when they did arrive, they were not subsequently forwarded to the ANP.

170. According to CFNIS interviews with relevant ANP officials and a review of related documents, the indication from the ANP is that they received no information from the Canadians regarding these detainees. Their own records note the reason for detention by

coalition forces as the fact that they were "firing weapons", which, in fact bears no relation to the circumstances of their apprehension.

171. Therefore, as their own interrogations of the detainees led them to believe that they were not a threat, the ANP indicated that they felt compelled to release them. This they did after arranging for a guarantee that their tribal elders would produce them later if required to do so. There was nonetheless a period of eight days following their transfer from CF custody in which the TFPM could have found a way to provide some information to assist the ANP in their investigation of the detainees.

172. Since that time, available information indicates that these detainees were involved with the Taliban insurgency and indeed that one of them, possibly D3, was subsequently killed in action against coalition forces. However, one of the consequences of the failure to obtain proper identification evidence from this detainee while at KAF is that a conclusive determination in this regard is not possible.

173. According to Maj (ret'd) Fraser, the records and information specified in the TSO to be provided to the relevant Afghan security organization to whom the detainees were to be transferred was deliberately held back because the information carried a "secret" security classification. However, the specific direction provided by the chain of command in TSO 321A in this regard would surely have overcome any concerns with violating Government of Canada or DND security policy or, at least, triggered thoughtful consideration of the content.

174. Indeed, there may have been valid operational security concerns with providing to the ANP some of the information required to be provided under the TSO. In such case, it would have been appropriate for the TFPM to seek further guidance from the chain of command and/or to see if relevant information could be provided in an alternative format which would address security concerns, but would also provide meaningful assistance to the Afghan authorities as intended under the TSO. There is no evidence that either of these steps was taken.

175. The failure in this case to provide the Afghan police with written accounts of the circumstances surrounding the capture of the detainees, or any associated evidence as to the activities which triggered their apprehension and the decision of the TFA to hold them for transfer (rather than release them) appears to have compromised the ability of the Afghan justice system to make an informed decision as to their disposition. This deficiency in the MPs' practices with regard to the gathering and sharing of information and evidence would not have provided a good example for any justice system, let alone a nascent one. Moreover, the failure to allow for the proper identification and questioning of all three detainees, and to ensure that relevant information and evidence was shared with the Afghan authorities, would seem to have rendered for naught the risks taken in their capture by other Canadian Forces members.

Finding #5:

For the reasons described in the foregoing paragraphs, the Commission finds that the military police were not negligent per se in failing to safeguard evidence of the treatment of the three detainees, including that related to a forensic medical examination. However, under the leadership of the Task Force Provost Marshal, the military police did succumb to perceived pressure from the chain of command for haste and, accordingly, and without the knowledge or approval of the Task Force Commander, failed to complete the mandated transfer procedures with resulting potential prejudice to operational objectives.

III. MATTERS ARISING FROM THE CFNIS INVESTIGATION LAUNCHED IN RESPONSE TO THIS CONDUCT COMPLAINT

A. Introduction

176. Although the Commission and the CFNIS conducted separate investigations in this matter, under separate mandates and authorities, given that the two investigations pertained to the same events, and addressed some of the same questions, it is necessary and appropriate for the Commission to consider the findings of the CFNIS investigation which concluded earlier this year. Apart from being a logical and useful source of relevant evidence, at least part of the CFNIS investigation directly pertains to the subject-matter of Dr. Attaran's conduct complaint, and as such, is a "matter related to the complaint," and therefore within the Commission's purview in this case. This being said, it should be made clear that the Commission's purpose herein is not to assess or review the conduct of the CFNIS investigation pursuant to any complaint.

177. In this Part, the Commission's experience conducting a parallel investigation with the CFNIS is first examined, followed by a comparative review of the findings and observations of the CFNIS investigation, consideration of the CFNIS Case Manager's critical assessment of factors which affected the progress of the CFNIS investigation and the work of MPs in Afghanistan, and finally, the Commission's findings pertaining to this Part.

B. Parallel Administrative and Police Investigations: The MPCC-CFNIS Protocol

178. This is the first time that there has been a complaint investigation by the Commission conducted parallel to a law enforcement investigation of the same matter. Moreover, the fact that the two investigations progressed simultaneously also broke new ground, and presented a number of unique advantages, as well as challenges. Overall, however, in the Commission's view this process worked successfully by enabling the mandates of both investigative bodies to progress concurrently and without compromising the integrity and independence of either. The Commission is appreciative of the cooperation of the involved members of the CFNIS.

179. Preservation of the independence and integrity of law enforcement investigations is a major part of the Commission's *raison d'être*. These attributes help protect both the rights of accused persons and the community interests represented by the prosecution. Due to the rights and interests of the accused which are in jeopardy in penal proceedings, the law naturally insists on the highest standard of evidence in order to prove an offence. As such, the efficacy of law enforcement investigations is particularly vulnerable to being compromised by the premature disclosure of investigative information and intentions to possible suspects and witnesses, or to prospective triers of fact in any resulting judicial proceeding. For this reason, where the investigative mandates of law enforcement and administrative bodies overlap, primacy in the event of conflicting interests, is generally given to the former.

180. In some cases, particularly where the administrative investigation involves public proceedings, it will often be necessary for the administrative body to suspend its process until the law enforcement investigation is completed. However, in other instances, it will be possible for an administrative investigation to proceed in a fashion which protects the interests of a parallel law enforcement investigation. It must be remembered that the primacy afforded to law enforcement investigations is a function of the need to satisfy the evidentiary standards of criminal judicial proceedings; it does not imply recognition that law enforcement processes are inherently more important in a general sense than administrative ones.

181. When a body, such as the Commission, exercises a statutory investigative mandate in the public interest which is oriented toward the identification of necessary systemic improvements to prevent the recurrence of serious problems, its processes are no less important to the public than those associated with law enforcement. Moreover, as administrative investigations examine past incidents in the context of evolving institutions, their mandates are arguably even more time-sensitive in terms of yielding useful lessons for the future.

182. Therefore, having satisfied itself that, in this instance, it could proceed in a fashion which would protect the interests of the ongoing law enforcement investigation, the

Commission determined that its public interest investigation of Dr. Attaran's conduct complaint should proceed and not await the completion of the CFNIS investigation. It is worth reviewing certain factors which contributed to this decision.

183. It must, first of all, be observed that the investigative mandates of the Commission and the CFNIS only partially overlapped in this case. The CFNIS investigation focussed on two sets of events: 1) the circumstances surrounding the causing of the injuries to D3 by the CF members who apprehended him; and 2) the response of the MPs at KAF to D3's injuries, both conducted with a view toward possible criminal or service charges. This first set of events, involving exclusively the actions of non-MP members, was entirely a law enforcement issue. The second set of events, however, gives rise both to a law enforcement interest, represented by the CFNIS investigation, as well as an interest in maintaining standards of MP conduct and professionalism, represented by the Commission's public interest investigation.

184. Secondly, the Commission was concerned about providing a timely response to the allegations contained in the complaint. Ten months had already passed since the events in question, and yet an MP investigation was only now being initiated into the matter for the first time. Moreover, given the number and location of potential witnesses and associated travel requirements, and potential challenges related to the location and retrieval of documentary evidence, there was no particular reason to be optimistic as to the speed with which the CFNIS investigation could be completed. Indeed, this expectation unfortunately turned out to be all too accurate, not due to any lack of zeal on the part of the investigators, but due to some unique challenges presented to them, both in terms of operating environment when in Afghanistan, but also to systemic and resource facts which will be addressed further below.

185. In these circumstances, it simply did not seem reasonable for the Commission to passively await completion of the CFNIS investigation, particularly in a complaint which the Commission had deemed to be a matter of public interest and where part of the rationale for that decision was the amount of time that had already elapsed.

186. However, the Commission's decision to proceed with its investigation in the face of an ongoing law enforcement investigation was subject to an important caveat. The Commission's investigation would have to be coordinated in such a way as to avoid compromising the CFNIS investigation. Indeed, the complainant himself was alive to this duty on the part of the Commission in carrying out its mandate.[19] Therefore, the Commission immediately sought a meeting with the Commanding Officer of the CFNIS for the purpose of discussing the arrangement of a protocol to provide for the coordination of Commission access to witnesses and the sharing of investigative information by the CFNIS with Commission investigators. In the resulting protocol, which was concluded on February 23, 2007, the Commission naturally committed itself to treat confidentially with any information provided by the CFNIS, until the CFNIS investigation was completed or disclosure was otherwise authorized by it.

187. This arrangement helped the Commission by enabling quicker access to certain information than would otherwise have been the case. Generally, the CFNIS as a CF unit, had more ready access to relevant documentary evidence and to military personnel serving in-theatre in Afghanistan. The arrangement also enabled the MPCC to make more efficient use of its own investigative resources. In a number of instances, it was determined, on the basis of CFNIS interview transcripts, that there was no need to conduct a separate interview for the Commission's investigation.

188. At the same time, however, it did mean that the timeframe necessary for the MPCC to complete its investigation was to a significant degree dependent on the rate of progress of the CFNIS. Moreover, it was only in the second phase of its investigation – that dealing with the acts/omissions of the MPs – that the CFNIS began to investigate matters relevant to the Commission, and thereby making witnesses available to be interviewed by the Commission. The CFNIS completed its last witness interview in late July, 2008.

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[19] See letter of February 7, 2007 from Dr. A Attaran to the Commission, at p. 3.

C. Results of the CFNIS Investigation

189. A CFNIS Case Manager's Report on this investigation was completed in late May 2008 and was submitted to the CFNIS leadership (i.e., the CO CFNIS and the CFPM). This report, which was provided to the Commission, contains analysis and findings with respect to a number of systemic and other matters in addition to those that address the particular allegations raised in Dr. Attaran's complaint to the Commission. The CFNIS investigation into this matter formally concluded with the submission of its completed investigation report to the CFPM on September 24, 2008. The Commission was provided with a copy of the report on October 1st. On the question of the cause of the detainees' injuries, the CFNIS concluded that the injuries to D1 and D2 were insignificant and consistent with the circumstances of their capture. In the case of D3, the CFNIS concluded that the injuries were the result of an intentional application of force, which they judged to be reasonable in the circumstances and in accordance with the applicable military rules of engagement for the mission.

190. So, although two and a half years had elapsed since the event (including the ten months before the matter was even referred to the CFNIS), the treatment of these detainees, and in particular D3, has finally received the requisite military police investigation. Moreover, although it would not be appropriate in the context of this report to offer any definitive assessment of the conduct of the CFNIS investigation, the Commission cannot but note its apparent thoroughness, which included considerable efforts to make contact with and interview the detainees in question,[20] and conducting portions of its work in a challenging and dangerous operational theatre.

191. The other elements of the CFNIS's investigative mandate in respect of this matter paralleled those of the Commission's public interest investigation. In these areas, it is noted that the two investigations independently reached the same key conclusions: the detainees were provided with appropriate medical care while in CF custody; the pre-transfer

[20] Moreover, in the case of the D3, which would have been the most critical witness interview of the three, any further efforts to speak with him have been rendered impossible due to his apparent demise during the course of the CFNIS investigation.

processing of D2 and D3 as per TSO 321A was not completed by the MPs prior to the detainees' transfer to the Afghan National Police; and there was a failure on the part of the MPs, ultimately attributable to the TFA MP Commander and TFPM, Maj (ret'd) Fraser, to investigate the cause of the injuries to D3. Furthermore, as with the Commission's investigation, the CFNIS investigation did not find that the failure to complete the required detainee-processing or to investigate the cause of D3's injuries was indicative of any deliberate effort to conceal the detainees' injuries.

192. Moreover, in respect of the CFNIS's determination that there had been a failure to investigate D3's injuries, [redacted] the CFNIS ultimately concluded that the omissions in question did not rise to the level of a service offence and so no charges would be laid. The CFNIS investigation report nonetheless characterized this omission and the failure to ensure completion of the TSO pre-transfer procedures represented "a serious lapse in judgment on the part of the TFPM." As noted in Part II of this report, the Commission agrees.

193. In addition to reaching similar findings on the complainant's allegations, the CFNIS and MPCC investigations both highlighted certain factors which directly contributed to the ultimate failings of the detainee-transfer process in respect of these detainees.

194. First, both the CFNIS and MPCC investigations revealed an apparent absence, among the MPs responsible for detainee-processing in Roto 1, of a recognition of any obligation to investigate the cause of D3's injuries arising from the MP Technical Directive.

195. Second, the constant pressure by the chain of command, particularly from CEFCOM and above, to effect the transfer of detainees to Afghan authorities at the earliest possible moment was a factor noted in both investigations, which contributed directly to the transfer of the detainees in this case prior to completion of the required procedures.

196. In the CFNIS Case Manager's Report, it is noted that efforts by the MP technical chain at the higher command level to influence the chain of command to ease the pressure for quick detainee transfers in order to ensure due diligence in the pre-transfer processing were unsuccessful. The two senior MP officers occupying the relevant positions at the time – Maj Gribble, the J3 MP Ops, and Maj Rowcliffe, the CEFCOM Provost Marshal – apparently conveyed a general sense of being marginalized within the operational command structure.

197. The CFNIS Case Manager's Report also observed that, notwithstanding the intentions apparent from requirements expressed in the relevant Theatre Standing Order and in the MP Technical Directive, little if any consideration or interest is apparent among the MPs posted to TFA as to how their processing of the detainees for transfer to the Afghan authorities could or should support Afghan criminal justice processes. The Case Manager's Report notes that this attitude would seem to be a function of the wider TFA perspective in which the security challenges posed by the Taliban insurgency are viewed strictly from a military perspective and in which the contributions which could be derived from appropriately-assisted Afghan criminal justice operations are not considered.

198. Of course, ISAF generally, and Canada in particular, have been involved in assisting in the training and mentoring of Afghan justice system officials, including the Afghan National Police. What the CFNIS report notes to be lacking, however, is any sense on the part of the MPs responsible for the pre-transfer processing of detainees at KAF that their role in this regard either does or should feed into and support the Afghan criminal justice system.

199. Overall, the CFNIS investigation appears to have revealed the disturbing prevalence of an MP mindset in which their police training and instincts are somehow submerged or switched off when assigned to duties considered by some to be purely military in nature.

200. In addition to noting its unique observations and conclusions, consideration of the complete CFNIS investigation clearly reinforces the Commission's findings numbers 3, 4 and 5.

D. Factors Affecting the CFNIS Investigation and the Policing Duties and Functions of MPs in Afghanistan

201. The CFNIS Case Manager's Report included a bold initiative by seconded RCMP Inspector Gfellner in which he provided a detailed critique of MP resource deficiencies and other factors which impeded the CFNIS investigation of this complaint, and in some cases continue to hamper the work of MPs on the ground in Afghanistan. The following discussion of the administrative and operational challenges which these deficiencies presented to the CFNIS investigation team is drawn from Inspector Gfellner's report.

202 The Case Manager's Report observed that the CFNIS investigation was "plagued" throughout by delays related to the securing of transcription services, which is vital to enabling the results of witness interviews to be analyzed and shared among the members of the investigative team. The review of interview transcripts is necessary to allow the investigators to efficiently and effectively prepare for subsequent witness interviews and compare the evidence of different witnesses. This requirement is especially significant in an investigation of this scale, which involved the completion of over 100 witness interviews among the team of eight full-time investigators plus the additional ad hoc investigative support provided by the CFNIS Team at KAF. The Case Manager's Report notes that the investigation team had to wait *several months* for interview transcripts at various points in the investigation. The relevant delays in securing transcription services apparently resulted from the need to acquire a new service contract through the Department of Public Works and Government Services, following the expiry of the previous contract.

203. Despite the importance of this investigation, the CFNIS investigation team seems also to have lacked dedicated clerical support. This deficiency contributed to delays as investigators were required to spend time typing their reports, scanning and vetting documents for disclosure, coordinating transcription services and performing other clerical functions.

204. The CFNIS investigation was faced with significant challenges due to inadequate information technology (IT) support, which were compounded by geographic dispersion of the investigative team (with full-time investigators drawn from three of the six CFNIS

regional offices) and the travel requirements of the investigation. The security classification level of the investigation precluded the use of the Security and Military Police Information System (SAMPIS). Nor was there an existing, appropriately-secure computer network available for the investigation team. As such, the CFNIS had to acquire additional IT equipment specifically for the investigation team, a process which the Case Manager's Report notes "added months to the investigation."

205. For the first seven months of the investigation, the entire investigation team had access to [redacted] At this point, the CFPM had to intervene personally for additional IT equipment to be made available. Ultimately, it required the Commanding Officer of the CFNIS to purchase [redacted] from the unit responsible for IT support within the CF, 764 Communications Group, in order to secure one. The [redacted] which were made available to the investigation team were old and bulky. The hard-drive of one of them failed due to age, necessitating the re-entry of significant data which had been lost. Moreover, subsequent support for the computers provided to the investigative team was slow to be provided, despite appeals from the lead investigator to the chain of command. The team waited months for items such as software, USB ports and cords, and local area network cords. The lead investigator's repeated requests for more modern laptop computers for use by investigators when travelling were all unsuccessful.

206. The CFNIS Case Manager also described a variety of problems related to the collection of documentary evidence relevant to the investigation, including:

a. "Considerable resistance" from the chain of command of the CF unit involved in the apprehension of the three detainees to providing relevant documents. Requested material was only provided when it became clear that the CFNIS was prepared to seek a judicial order compelling production under the *Criminal Code*.

b. Despite an immediate search of the MP facilities at KAF for all relevant records, pertinent documents, including MP notebooks, were located there

months later. The cause was attributed to poor record storage maintenance practices and constant turn-over of personnel.

c. Despite repeated efforts to locate the medical records pertaining to the examination of the three detainees at the KAF "Role 3" Multinational Medical Unit, the relevant files were not acquired by the CFNIS until seven months into the investigation when they were apparently found in a medical staff lounge at KAF. However, a document containing the CT-scan of D3 had somehow made its way to Halifax before being located and turned over to CFNIS.

d. Although numerous versions of Theatre Standing Order 321A governing the pre-transfer handling and processing of detainees were promulgated and circulated, investigators were only able to obtain the official version signed by the TFA Commander eleven months into the investigation.

e. In its efforts to secure relevant electronic military communications originating from KAF for the relevant period, CFNIS was [redacted] Instead, the [redacted] had to be secured and the hard drive for the relevant period rebuilt in order to enable a search for relevant communications traffic.

207. The general shortage of available and reliable interpreters was also noted in the Case Manager's Report to be a considerable challenge to the investigation. There was no dedicated translation support to MP operations in-theatre on which CFNIS investigators could draw during in-theatre portions of the investigation. They had to be acquired each time, often with considerable difficulty, on an ad hoc and unpredictable basis. In the first phase of the investigation, KAF CFNIS investigators relied on interpreters borrowed from other in-theatre CF elements.

208. In advance of CFNIS investigation team members travelling to Afghanistan for in-theatre portions of the investigation, efforts were made to secure reliable interpreters from Canada, through the Directorate of Defence Intelligence, to accompany the CFNIS

investigators. This approach was preferred on grounds of reliability, both in terms of quality of interpretation and also availability. Interviews in-theatre, particularly outside of KAF, required precise planning, and any last-minute unavailability of interpretation support was problematic. However, the Directorate of Defence Intelligence, who employed a pool of such interpreters (called Local Cultural Advisors) told the CFNIS Case Manager that the CFNIS would have to hire their own interpreters. However, as the Case Manager points out, the CFNIS has no mandate, human resources services or funding to directly recruit such professionals.

209. At another point, CFNIS investigators arriving at KAF from Canada were informed that previously-committed in-theatre interpreter services were no longer to be made available. The promised interpreter was ultimately provided, but only after a direct approach to the TFA Commander and the presentation to him of a letter from the VCDS requesting that all reasonable assistance be provided to the CFNIS investigation.

210. Moreover, as the CFNIS Case Manager correctly points out, the lack of interpretation support dedicated to the MPs at KAF is an ongoing detriment to MP operations in-theatre. Interpreters are made available to the MPs only when the detainees arrive for processing and tactical questioning. If Afghan detainees remain in MP custody beyond this initial period, the MPs perform their custodial functions without interpretation support which would allow them to communicate with detainees or to know what detainees may be saying to each other. The Case Manager further observes that the lack of interpretation support also helps to explain why effective liaison with Afghan police has not been developed by the MPs at KAF. When members of the investigation team were in KAF in March 2008, they were advised that the MPs were not on the TFA Commander's priority list for interpretation services.

211. Finally, while not specifically cited as contributing to delay in the investigation, the CFNIS case manager also pointed to the lack of access to independent legal advisory services as an area of concern. Legal support to CFNIS is provided by CF legal officers of the Office of the Judge Advocate General, typically through the Directorate of Military Prosecutions. However, in the view of the Case Manager of the CFNIS investigation, the

lack of dedicated legal counsel, independent from the rest of the CF, and appropriately attuned to the CFNIS's particular needs, can serve to undermine the CFNIS's investigative independence. The Commission notes that "in-house" legal advisory services are now the norm in Canada, at least among the major civilian police services.

212. The general picture of the military police conveyed by the CFNIS Case Manager's Report is one of continued marginalization within the culture of the CF, both in terms of the perceived value of their work, and their positioning in the command structure. This portrait, and the apparent resulting inadequacies in resourcing, tends to belie the expectations of the MPs on the part of commanders as expressed to the Commission in its investigation. If operational commanders are indeed relying on the particular training, skills, expertise and judgment of military police to the extent suggested, then military police must be appropriately resourced and positioned in the CF command structure.

213. The CFNIS investigation into this matter has addressed some important systemic issues, quite apart from its findings with regard to the treatment of the three detainees at issue in this complaint. While it is not the role of the Commission to judge the CFNIS investigation in this case, it must be recognized that the CFNIS investigative team – and in particular, the investigation Case Manager, RCMP Inspector George Gfellner – have presented significant and insightful findings and recommendations toward the further improvement of military policing in the CF, and the enhancement of the military police contribution to deployed operations, such as Task Force Afghanistan.

214. As the police are irrefutably a key component of any justice system the effective function of the military police of the Canadian Forces is essential to the proper operation of the military justice system, and, equally important, for the maintenance of confidence in that system. This fact was recognized in multiple inquiries and reviews concerning the military justice system in the 1990's, which, at least as a matter of perception, brought into question public confidence about Canadian values, most particularly the Rule of Law, being carried abroad by Canada's military forces. Significant efforts were made, commencing in 1998 with the passage of Bill C-25 in amendment of the *National Defence Act* and following, to restructure the military justice system, including the military police, in order to address this

critical national concern. The question remains whether those changes and the subsequent execution or performance of same were and are sufficient.

215. The investigations are indeed limited to three detainees. However, it is the Commission's view that they present a valuable opportunity, notwithstanding limitations in scope, to assess the success of some of the '90's initiatives. Moreover, the statements made and mindsets exhibited by some of those interviewed, both military police members and others, would seem to go far beyond the boundaries of these events in terms of operating norms and represent, what might be called, historical cultural paradigms.

216. In the view of this Commission, modern and effective policing requires, amongst other factors, but, at a minimum:

a) Independence, both real and perceived, which effectively rebuts any notion that it is being carried out at the behest of any individual or interest group. It must be clear, however, that this independence does not equate to autonomy of a sort that means working in isolation from the legitimate interests of the community being served (in the case of the military police, the "community" is represented in part by the CF chain of command); the success of policing depends on the approval and acceptance of the community, a requisite set in place by Sir Robert Peel as early as 1822[21];

b) A command and control structure that ensures standards and facilitates the appropriate, coordinated and cohesive response of this important and powerful agent of the state. This element, in particular, should be of no surprise to and easily understood by those schooled in the profession of arms and the requirement for military hierarchy;

c) Ethical principles and professional practices or standards commonly understood by all, and vigorously reinforced; and,

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[21] Sir Robert Peel served as Home Secretary and later Prime Minister of the United Kingdom in the early to mid 19th Century. As Home Secretary, he is credited with the establishment of the London Metropolitan Police Force in 1829 and with the development of the "Nine Principles" of modern policing.

d) Resourcing, in all respects, that recognizes the importance attached to the policing function by the community and allows for a level of service which maintains the confidence of the community.

217. Again, the question remains as to whether the reforms and restructuring of the late '90's have been sufficient for the successful evolution of the military police. As highlighted by, and against the background of, the events associated with this complaint a most serious issue is raised in that regard. As revealed by this Commission's inquiries, as well as the independent self-critique provided by the CFNIS, it would appear clear that the military police are still not positioned, permitted or resourced to make the necessary and valuable contribution of which they are able in support of Canadian Forces operations. This is a contribution which they must make if the public concern as represented by this complaint is to be avoided, or at least dealt with in a manner which maintains confidence. Most significant of the continuing impediments to the performance of the military police as a whole, at least as revealed by the facts of this case, would appear to be the present constitution of the office of the CFPM wherein theoretical responsibilities would appear to vastly exceed any notion of the authority necessary for carriage of those responsibilities. At the very least, the result as revealed herein is members of the military police who do not fully understand the nature and extent of their policing duties and responsibilities, and worse, are confused by or non-accepting of, legitimate direction in respect of those duties and responsibilities.

Finding # 6:

The Commission finds that, as revealed by examination of the events associated with this complaint, the legislative initiatives of the late 1990's and other measures following have not been fully successful in structuring, positioning and resourcing the military police to enable performance at the required standard to make their full potential contribution to the Canadian Forces, and thereby maintain the confidence of the Canadian community.

IV. SUMMARY OF FINDINGS AND THE COMMISSION'S RECOMMENDATION

Finding # 1:

The Commission finds that the allegation of inhumane treatment of the detainees by military police members is not substantiated in that: no harm was caused to the detainees by any acts or omissions on the part of military police; and, the detainees were afforded prompt and appropriate medical care while in military police custody.

Finding #2:

The Commission finds that the allegation that the military police failed to seize and inventory the detainee's personal effects is not substantiated in that those personal effects were seized and an inventory was, in fact, included with the other detainee records, albeit not in the prescribed form.

Finding #3:

The Commission finds that there was a failure by the military police (with the exception of the National Investigation Service members who were present, but not informed or engaged) to investigate the origins of the injuries of one of the detainees, when it was their duty to do so.

Finding #4:

The Commission finds that the failure to investigate the origins of the detainee's injuries was in no way related to the concealment of mistreatment of detainees by members of the Canadian Forces, but rather it was attributable to a general failure, ultimately the responsibility of the Task Force Provost Marshal, to:

a) Understand the immutability of their policing duties and responsibilities even while deployed in an operational theatre;

b) Recognize the role of the Canadian Forces Provost Marshal as the senior technical authority in respect of policing matters, notwithstanding and independent of the operational chain of command, and to respect the directions issued by that office; and,

c) Comply with the clear expectations of senior operational commanders regarding vigilance over the treatment of detainees to be performed by the military police.

Finding #5:

For the reasons described in the foregoing paragraphs, the Commission finds that the military police were not negligent per se in failing to safeguard evidence of the treatment of the three detainees, including that related to a forensic medical examination. However, under the leadership of the Task Force Provost Marshal, the military police did succumb to perceived pressure from the chain of command for haste and, accordingly, and without the knowledge or approval of the Task Force Commander, failed to complete the mandated transfer procedures with resulting potential prejudice to operational objectives.

Finding # 6:

The Commission finds that, as revealed by examination of the events associated with this complaint, the legislative initiatives of the late 1990's and other measures following have not been fully successful in structuring, positioning and resourcing the military police to enable performance at the required standard to make their full potential contribution to the Canadian Forces, and thereby maintain the confidence of the Canadian community.

218. Two observations are perhaps appropriate, preliminary to the Commission's recommendation in this matter. First, in its Findings numbered 3, 4, and 5 the Commission has determined there were certain failings in respect of the performance of military police duties and functions. These failings were, based on personal acts and omissions, as well as on the principle of command responsibility, ultimately attributed to the Task Force Provost Marshal, the senior military police officer in Afghanistan. In the Commission's view, these failings were serious in and of themselves, and in the result. However, the TFPM in question is, having retired, no longer a member of the military police and, according, no longer necessarily relevant to any corrective action. Moreover, the Commission has also identified certain overarching systemic issues which appear to have directly contributed to the failings in question and which are substantially more significant in terms of the way ahead. In light of these considerations, the Commission respectfully submits its Recommendation as set out below.

219. Second, the Commission normally renders its recommendations to the statutorily designated primary recipient of the report, i.e. the CFPM, CDS, Minister of National Defence etc. as the case may be, with the understanding that the designated office holder has

the authority to act appropriately in furtherance of the recommendation(s). In the instant case the designated recipient is the CFPM, but there was no expectation that he possessed the required authority to act. Accordingly, in this somewhat unique and important case, the Commission made its recommendations to the attention of the Canadian Forces Provost Marshal, the Chief of the Defence Staff and the Minister of National Defence in the hope that they would work and respond collaboratively, as may be required by the nature of the recommendations.

Recommendation # 1:

Further to its Findings 1 through 6 as set out in Parts II and III of this report the Commission recommends that further study be undertaken of the status and role of the military police at all levels within the Canadian Forces with particular consideration of and a view towards ensuring:

a) **That a new and more complete command and control structure is put into place which allows the CFPM to fulfill the important responsibilities of that office for the delivery of effective and cohesive police services throughout the Canadian Forces, as a key component of the military justice system and in support of military operations;**

b) **That, given strong historical and cultural paradigms, an education program be developed for the leadership of the military police and the broader Canadian Forces to ensure clear understanding of any changes in role and structure and, most particularly, to address the important and delicate balance between independence and not working in isolation from the community, that is mutual respect between the operational and MP chains of command; and,**

c) **That, equally important, training be reinforced for members of the military police in respect of their constant responsibilities for the performance of policing duties and functions as an essential part of, as opposed to distinct from, their duties as members of the Canadian Forces; and,**

d) **That the military police be resourced, both in terms of personnel and equipment, in a fashion that permits them to, in fact, provide a high level of professional policing services in support of the military justice system and military operations.**

220. In his April 3, 2009 Notice of Action, the CFPM indicated his agreement with this recommendation. The CFPM further advised that he had, in fact, presented options for a more complete military police command and control structure to the Chief of the Defence Staff's Command Council, where the matter is presently under consideration. As such, the

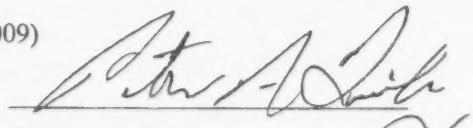
Commission is awaiting a further response to its recommendation from the Chief of the Defence Staff, at which time it will issue an addendum to this report.

221. With regard to the specific issue of military police training on the constant nature of their policing responsibilities in part c) of the recommendation, the CFPM advised that without the necessary structural reforms to military police command and control, further training in this area would not be effective. I agree.

222. With respect to the resourcing issue in part d) of the recommendation, the CFPM advised that, in his view, the resource problems encountered during the CFNIS investigation were more a function of a failure to communicate the priority of military police investigative needs to CF support entities. The CFPM further advised that the problems identified during the CFNIS investigation were discussed in detail with the Vice-Chief of the Defence Staff and that, as a result, the CFPM was confident that such problems would not impede future investigations. The Commission hopes that the CFPM's confidence will be reflected in the results of future investigations.

223. While most of the specific military police conduct allegations made by the complainant proved to be unfounded, the investigation of this complaint was nonetheless a worthwhile and salutary exercise. Any suspicions that the responsible military police personnel might have mistreated persons in their care, or sought to conceal such mistreatment by others, have been dispelled. Moreover, the resulting investigations, both by the CFNIS as well as by the Commission, identified important systemic deficiencies which have impeded the realization of the full potential military police contribution to the CF. The Commission is pleased to note the recognized significance of the concerns, expressed in this report and by the CFPM, reflected in the serious consideration being given to the recommended reforms by the senior CF leadership.

Ottawa, April 23, 2009
(Reissued with reduced redactions: November 3, 2009)



Peter A. Tinsley
Chairperson